Supreme Court, U. S.
FILED
JUL 15 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-90

DANIEL BURCH and WRESTLE, INC.,
Petitioners,

versus

STATE OF LOUISIANA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

The petitioners, Daniel Burch and Wrestle, Inc., pray that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of the State of Louisiana rendered in these proceedings on June 19, 1978.

OPINION BELOW

The opinion of the Supreme Court of the State of Louisiana has not yet been officially reported, but the slip opinion appears at Appendix A, infra.

JURISDICTION

The judgment of the Louisiana Supreme Court was entered on June 19, 1978. No application for rehearing was filed. This petition for certiorari is filed less than ninety days from the date aforesaid.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Whether conviction by a non-unanimous six-person jury offends the right of persons criminally accused of non-petty offenses to the jury trial guaranteed them by the Sixth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

The Constitution of the United States, Amendment XIV, Section 1: ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

The Constitution of the State of Louisiana, Article I, Section 17: ". . . A case in which the punishment may

be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. . . ."

Louisiana Revised Statutes 14:106: "G. Whoever commits the crime of obscenity shall be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned in the parish prison for not more than one year, or both. . . ."

STATEMENT OF THE CASE

Petitioners were convicted on two counts each by a six-person jury in the Criminal District Court for the Parish of Orleans, State of Louisiana, of the crime of obscenity. The bill of information charged violation of the State Obscenity Statute, LSA R.S. 14:106, by showing obscene movies through a coin-operated picture machine in downtown New Orleans.

After the jury brought in verdicts convicting both defendants of both counts, the jury was polled and had found the defendant Burch guilty by a vote of 5 - 1 and the defendant Wrestle, Inc. guilty by a unanimous verdict.

Burch was sentenced to serve two consecutive seven month terms in parish prison, suspended, and placed on inactive probation for two years for each count, to be served concurrently; a condition of the probation was that he pay $1,000 to the judicial expense fund. Wrestle, Inc., was sentenced to pay a fine of $600 on

each count. Defendants timely appealed to the Louisiana Supreme Court.

After the trial but prior to argument on appeal this Court decided *Ballew v. Georgia*, 98 S. Ct. 1029, holding that a criminal trial in a non-petty case to a jury of only five persons deprives the accused of his right to trial by jury. This holding was urged by defendants on appeal before the Louisiana Supreme Court. That Court, holding that defendants' contentions alleged error patent on the face of the proceedings (Slip opinion, p. 12a, infra), considered on its merits the contention of the unconstitutionality of a non-unanimous verdict by a six-person jury. The Court held that, though the issue was close, it would "indulg[e] in the presumption of federal constitutionality which must be afforded to provisions of our state constitution . . ." (Slip Opinion, p. 14a-15a, infra), and held that petitioners' federal constitutional rights had not been violated.

REASONS FOR GRANTING THE WRIT

The Louisiana Supreme Court, in holding that conviction by a non-unanimous six-person jury does not offend the right of persons criminally accused of non-petty offenses to the jury trial guaranteed them by the Sixth and Fourteenth Amendments to the United States Constitution, has decided a federal question of substance not heretofore determined by this Court. Further, it has decided it in a way probably not in accord with the applicable decisions of this Court.

ARGUMENT

Prior to 1974 Louisiana law provided for a jury of five for lesser felonies, with a requirement for a unanimous verdict. The law then was substantially similar to the Georgia jury provision invalidated earlier this year by this Court in *Ballew v. Georgia*, ___ U.S. ___, 98 S. Ct. 1029 (1978). The new 1974 Louisiana constitution changed this requirement by adding a sixth juror, though requiring that only five must concur to render a verdict. Article I, Section 17. It is submitted that the principles and considerations which caused this Court to invalidate the Georgia jury provision in *Ballew* apply with equal if not greater force to the Louisiana provision for a non-unanimous six-person jury.

In *Williams v. Florida*, 90 S. Ct. 1893 (1970) this Court held that a six-man jury did not violate Sixth Amendment rights, because such a jury should probably be large enough to promote group deliberation, be free from outside attempts at intimidation, and should provide a fair possibility for obtaining a representative cross-section of the community. The Court stated:

> "But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers twelve — *particularly if the requirement of unanimity is retained.*" (emphasis added)
>
> 90 S. Ct. 1893, at 1906

In Louisiana, since unanimity is not required in a six-man jury, the question arises as to whether the goals mentioned by this Court will be met by permitting conviction upon the agreement of five of the six jurors. In *Ballew*, Justice Blackmun, writing for the Court, lists four "concerns" about reducing a jury to below six members. Some of the concerns are just as applicable to a jury requiring that five agree for a decision.

One concern mentioned by Justice Blackmun, at 98 S. Ct. 1037, is that with a reduced jury the chance for hung juries would decline, to the detriment of the defense. Clearly, this concern applies to a Louisiana six-person jury with greater force, since only five persons are required for conviction.

Other concerns voiced by Justice Blackmun are also applicable to the Louisiana jury system, arguing for its unconstitutionality. The fourth concern mentioned by Justice Blackmun is that representation of minority groups in the community is not sufficiently protected by a five-man jury. While a six-man jury may provide more opportunity for minority groups to have a person present to argue a minority viewpoint in the jury room, the fact that only five members are required to convict reduces the chance for meaningful participation by any minority member who may be present but whose vote will have no influence on the verdict.

Thus, it is submitted that the concerns evidenced by the Court in *Ballew v. Georgia* are applicable to the Louisiana six-man jury just as they are applicable to a

five-man jury. The concurring opinions in *Ballew*, which suggested generally that a jury of fewer than six persons would "fail to represent the sense of the community and hence not satisfy the fair cross-section requirement of the Sixth and Fourteenth Amendments," 98 S. Ct. at 1042, are not contrary to Appellants' argument here. If a jury of five fails to represent the sense of the community, a body of five authorized to convict out of a formal jury of six nonetheless fails to represent the sense of the community.

If five out of five does not offer sufficient protection for an accused, five out of six offers him even less protection.

The Louisiana Supreme Court has stayed its mandate until September 22, 1978 in order to give petitioners an opportunity to apply to this Court.

CONCLUSION

For the above reasons, the issuance of the mandate by the Louisiana Supreme Court should be stayed and a writ of certiorari should be issued to review the judgment of that court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this ____ day of July, 1978 forwarded three copies of the foregoing Petition for Certiorari to the District Attorney for the Parish of Orleans, Honorable Harry Connick, by United States mail, postage prepaid.

JACK PEEBLES

APPENDIX

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA,
Appellee

versus No. 61,342

WRESTLE, INC. and
DANIEL W. BURCH,
Appellants

Appeal from the Criminal District Court,
Orleans Parish; Honorable Rudolph F. Becker, III,
District Judge, Presiding.

(Filed: Jun. 19, 1978)

TATE, Justice.

The principal issues raised by the defendants' appeal concern: I. The constitutionality of the obscenity statute under our state constitution (Assignment 1): II. The alleged lack of proof that the defendant Burch, a corporate officer, had knowledge (scienter) of the contents, nature, or character of the obscene films exhibited on premises operated by the corporation (Assignment 4); and III. The denial of the defendant Burch's federal constitutional right to trial by jury through the determination of his guilt by the verdict of a non-unanimous (5-1) verdict of the six-person jury.

The defendants, Wrestle, Inc. and Daniel W. Burch, its president, were jointly charged in two counts with

exhibition and display of obscene hard-core sexual conduct. La. R.S. 14:106. The six-person jury unanimously convicted Wrestle, Inc. and, by vote of 5-1, likewise convicted the defendant Burch of both counts.[1]

The defendants are charged with the exhibition and display of two obscene motion pictures. The evidence shows that these films were exhibited in booths (peep shows) at Mid-Town News, premises operated by the corporate defendant. The films were located in small booths in a rear room of the store, in which were situated coin operated projectors. By insertion of a quarter, these permitted viewing through its projection a portion of the film onto a small viewing screen.

I. *Constitutionality*

By their motion to quash the informations, the defendants charge that La. R.S. 14:106 is unconstitutional as vague, arbitrary, and overbroad.[2] Specifically, the defendants contend that the indictment founded on the statute does not, as required by our state constitution, adequately inform the accused of the nature and cause of the accusation against him. La. Const. of 1974, Art. 1, Section 13.

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1 Burch was sentenced to serve two consecutive seven month terms in parish prison, suspended, and placed on inactive probation for two years for each count, to be served concurrently; a condition of the probation was that he pay $1,000 to the judicial expense fund. Wrestle, Inc., was sentenced to pay a fine of $600 on each count.

2 We have previously rejected contentions that the statute offends federal constitutional standards in these regards. State v. Amato, 343 So.2d 698 (La. 1977).

The defendants are charged with exhibiting obscene material. La. R.S. 14:106(A)(3)[3] defines "obscene material" as a tangible work or thing which displays "hard-core sexual conduct"[4] depicted "in a patently offensive way", "which the trier of fact determines that the average person applying contemporary community standards would find, taken as a whole, appeals to the prurient interest."

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3 The full definition in this statutory provision is as follows:
"Obscene material is any tangible work or thing which the trier of fact determines (a) that the average person applying contemporary community standards would find, taken as a whole, appeals to the prurient interest, and (b) depicts or describes in a patently offensive way, hard core sexual conduct specifically defined in Paragraph (2) above, and (c) the work or thing taken as a whole lacks serious literary, artistic, political, or scientific value."
Similar tests are set forth for the presentation, exhibition, or display of hard-core sexual conduct. La. R.S. 14:106(2).

4 The statutory definition in La. R.S. 14:106(A)(2) is as follows:
"* * * Hard core sexual conduct is the public portrayal, for its own sake, and for ensuing commercial gain of:
(a) Ultimate sexual acts, normal or perverted, actual, simulated or animated, whether between human beings, animals, or an animal and a human being; or
(b) Masturbation, excretory functions or lewd exhibition, actual, simulated or animated, of the genitals, pubic hair, anus, vulva, or female breast nipples; or
(c) Sadomasochistic abuse, meaning actual, simulated or animated, flagellation, or torture by or upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals, or female breast nipples, or in the condition of being fettered, bound, or otherwise physically restrained, on the part of one so clothed; or
(d) Actual, simulated, or animated touching, caressing, or fondling of, or other similar physical contact with a pubic area, anus, female breast nipple, covered or exposed, whether alone or between human, animals, or a human and an animal, of the same or opposite sex, in an act of apparent sexual stimulation or gratification; or
(e) Actual, simulated, or animated stimulation of a human genital organ by any device whether or not the device is designed, manufactured, or marketed for such purpose."

The defendants suggest that the following phrases of the definition are sufficiently indefinite as to render the statute unconstitutional: "Contemporary community standards," "prurient interest," and "patently offensive." They argue that, to give the jury such a set of variables but without providing adequate objective criteria for determining the content of the variables, simply passes on to the jury what should be a legislative function.

In short, the defendants rely upon jurisprudential expressions that, under our state constitution, a person cannot be subject to criminal prosecution for any act unless that act has first been denounced with sufficient legislative precision that the person sought to be held accountable will know that his conduct falls within the prohibition of the statute.

The legislation defines hard-core sexual conduct, an essential element of the crime, in concrete and specific terms. La. R.S. 14:106(A), quoted in footnote 4 above. By this definition, the potential offender is informed with specificity of the type of conduct which subjects him to criminal penalty.

Additionally, however, the trier of fact is obliged to determine whether such explicitly defined sexual portrayal is depicted "in a patently offensive manner" and that the average person "applying contemporary community standards" would find that the work as a whole "appeals to the prurient interest."[5] The purpose

5 There must also be a public portrayal for its own sake and for commercial gain of hard-core pornography in order to subject the offender to criminal penalties. La. R.S. 14:106(A)(2). Further, the work taken as a whole must lack "serious literary, artistic, or political value." La. R.S. 14:106(A)(2), (3).

of the community standards test, first enunciated in Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304 (1957), was to emphasize the need for an external standard, as compared with the trier of fact's personal views of decency, and to prevent the evaluation of obscenity being based on whether the material had an adverse effect on any particularly susceptible subclass of the community. 354 U.S. 488-91, 77 S.Ct. 1311-12. See Schauter, The Law of Obscenity 117 (1976).

This standard for the factual determination of criminal conduct is thus essentially designed to protect an accused against conviction for exhibition of what otherwise falls within the explicit statutory definition of hard-core pornography. As stated in another context in Hamling v. United States, 418 U.S. 87, 104-05, 94 S.Ct. 2887, 2901 (1974), the trier of fact is by this standard only "entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law."

The Louisiana obscenity statute, in the portions quoted in this opinion (see footnotes 3, 4), clearly complies with the federal constitutional requirements of regulating only specifically defined sexual conduct, limited to works which, taken as whole, appeal to the prurient interest in sex, which portray this conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value. Miller v. California, 415 U.S. 15, 25, 93 S.Ct. 2607, 2614-15 (1973). (Likewise, our statutory

guidelines for the trier of fact comply with the federal constitutional standard for factual determination of obscenity, including by the use of contemporary community standards. Id.)

As *Miller* notes, compliance of a state statute with these constitutional prerequisites "will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." 413 U.S. 28, 93 S.Ct. 2616-17. We are satisfied that such notice not only satisfies federal due process and First Amendment requirements but also similar notice requirements of our state constitution.

We therefore reject the defendant's contention that the statute does not adequately inform the accused of the conduct proscribed by it.

The defendant further contends that the community standard for determination of obscenity leaves protection of constitutional freedom of expression to the whim of each jury. In this regard, *Miller* states: "If a state law that regulates obscene material is thus limited . . . [as is Louisiana's], the First Amendment values . . . are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." 419 U.S. 25, 93 S.Ct. 2615.

We have recognized our duty to conduct an independent constitutional review in the appellate court of constitutional claims. State v. Amato, 343 So.2d 698, 703-04 (La. 1977). As we stated in State v. Luck, 343 So.2d 225, 230 (La. 1977): "* * * the trial court's determination that material is or is not obscene presents an issue of law fully reviewable by this court. Even the factual determination of obscenity by a trial jury must be subject to full appellate review to meet constitutional standards designed to effectuate freedom of expression. Jenkins v. Georgia, 418 U.S. 153, 94 S.Ct. 2750 (1974)."

The trial court properly overruled the defendants' motion to quash the indictment.[6] We find no merit to this assignment of error.

II. *"Scienter"*.

In his motion for a new trial, the defendant Burch contended, inter alia, that there was no evidence that he had knowledge of the contents, character, or nature of the obscene films exhibited by the corporation co-defendant. Burch was the president of the corporation.

Determination of guilt of obscenity constitutionally requires proof of scienter or knowledge. Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1959). As the decision indicates, this proof may be circumstantial. The state need not, however, show the defendant knew the legal

6 We do not regard as substantial the defendant Burch's further contention that the statute unconstitutionally denies him equal protection of the laws because he, as a corporate *officer*, is subjected to criminal liability for obscene films exhibited, whereas (see La. R.S. 14:106 C) exempted from criminal responsibility is a non-managerial corporate *employee* without financial interest in the exhibit. Without discussion of the obvious reasons, we conclude that there is a rational basis for such differentiation reasonably related to a valid governmental purpose, unlike the unconstitutional (irrational) differentiation in State v. Johnson, 343 So.2d 705 (1977) between one class of employees and another.

status of the materials to be obscene; it is sufficient that, under the statute, the state be required to show that the accused had knowledge of or had reason to know of the character and nature of the contents of the materials for distribution or exhibition of which he was responsible. Hamling v. United States, 418 U.S. 87, 119-25, 94 S.Ct. 2887, 2908-11 (1974); Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274 (1968); Mishkin v. New York, 383 U.S. 502, 86 S.Ct. 958 (1966); Schauer, The Law of Obscenity 222-26 (1976).

The trial judge therefore instructed the jury that the evidence must show beyond a reasonable doubt "that the defendants had knowledge of the character and content of the motion picture at the time that the defendants possessed, exhibited, and displayed the material." The trial judge further instructed the jury: "* * * when you are considering whether the defendant had guilty knowledge, you are to consider whether he personally knew, not whether some person allegedly acting for him knew about it, nor whether some associate knew about it. In this kind of case, whatever may be the rules of agency in civil matters, individuals are to be charged on the basis of the personalized individual knowledge only."

Thus instructed, the jury found (5-1) the defendant Burch guilty of both counts.

The evidence shows: The defendant Burch was the president of the corporation which operated the store. It was a local corporation, and Burch lived in the locality. In the back of the store was a small room with twelve coin-operated viewing machines.

Burch was seen in the store by a police officer on at least one of his visits to it. A defense witness saw Burch on the premises some six months before, building the booths for the peep shows in which the obscene films were exhibited. The films last from eight to ten minutes, and quarters must be inserted periodically, costing from three to four dollars to see a film in its entirety.

As summarized in State v. Lindinger, 357 So.2d 500 (La. 1978): Sufficiency of the evidence is a factual matter not reviewable on appeal. The reviewing court may reverse only if there is no evidence to prove the crime or an element of it. In determining whether the circumstantial evidence constitutes some evidence of the crime, the reviewing court must determine whether there is some evidence from which, if accepted by the jury, it could reasonably conclude beyond a reasonable doubt that it excluded every other reasonable hypothesis, as required by La. R.S. 15:438, than the essential element sought to be proved (here, that the accused Burch knew or had reason to know of the nature and character of the films exhibited by his corporation). See also State v. Schwander, 345 So.2d 1173 (La. 1977).

Assayed by this test, some evidence was introduced by which the jury could reasonably conclude beyond a reasonable doubt that the resident president of this local corporation (who had actually participated in building the booths apparently intended for the sole purpose of exhibiting pornographic films) had knowledge or reason to know of the nature and character of the films exhibited therein. Although the issue is

close, we are unable to hold that this assignment presents reversible merit.

III. *Non-unanimous Six-person Jury*

By brief and argument in this court, the defendants for the first time contend that Louisiana law, which permits conviction by a non-unanimous six-person jury, offends the right of persons criminally accused of non-petty offenses to the jury trial guaranteed them by the Sixth and Fourteenth Amendments to the United States Constitution.[7]

The defendants base their contention upon Ballew v. Georgia, ___ U.S. ___, 98 S.Ct. 1029 (1978). This decision held that trial before a five-person jury offends federal constitutional rights, even though a unanimous verdict is required.

Initially, we are given concern because the alleged error was not raised by objection in the trial court at the time of the jury trial, La.C.Cr.P. art. 841, nor assigned as error, La.C.Cr.P. art. 920. It thus cannot be the subject of appellate review unless the error "is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." La.C.Cr.P. art. 921(2).

Historically, our jurisprudence does not permit in-

7 The right of a defendant in a criminal proceeding to a trial by jury guaranteed by the Sixth Amendment was held to be applicable to state criminal proceedings by virtue of the Fourteenth Amendment in Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444 (1968).

spection of the trial transcript to ascertain such errors, see State v. Craddock, 307 So.2d 342 (La. 1975), but only of the pleadings and proceedings alone considered part of the record for purposes of patent-error appellate review — in general, the indictment or information, the minutes, and the verdict and sentence.[8]

In this case, the minute entry shows that, after the jury brought in verdicts convicting both defendants of both counts, the jury was polled and had found the defendant Burch guilty by a vote of 5-1. Although the matter is not free from doubt[9], we have held without

8 In State v. Sanford, 248 La. 630, 181 So.2d 50 (1965) we summarized the jurisprudence as holding that the record of the pleadings and proceedings, for purposes of determining patent error, "includes the caption in the case, a statement of time and place of holding the court, the indictment or information with the endorsement, the arraignment, the plea of the accused, mention of the impaneling of the jury, verdict, and judgment of the court." 181 So.2d 51.

9 The essential basis for the defendants' contention is their attack on the constitutionality, under the federal constitution, of the provisions of state law which permit a non-unanimous verdict in six-person juries: La. Const. of 1974, Art. 1, Section 17; La.C.Cr.P. art. 782.

On the one hand, some jurisprudence provides that the grounds of unconstitutionality must first be asserted in the trial court. State v. Campbell, 263 La. 1058, 270 So.2d 506 (1972); State v. Kavanaugh, 203 La. 1, 13 So.2d 366 (1943); City of Shreveport v. Pedro, 170 La. 351, 127 So. 865 (1930). On the other hand, the unconstitutionality of a statute *on which a conviction is based* may be noticed as patent error. State v. Stewart, 325 So.2d 828 (La. 1976). Yet, if a defendant withdraws in the trial court his attack upon the constitutionality of such a statute, his waiver precludes appellate review of (what under *Stewart* is patent constitutional) error in this regard. State v. Jones, 347 So.2d 200 (La. 1977).

We make no effort here to reconcile these conflicting principles enunciated by our jurisprudence. Arguably, although a non-curable attack upon the substantive statute upon which a conviction is based may be noticed at any time, a procedural deficiency (such as the alleged statutory provision for a non-unanimous jury verdict) should be raised in the trial court by appropriate motion

discussion that under such circumstances we may, from the minute entry, discover by mere inspection the basis for a defendant's contention that a non-unanimous jury verdict represents constitutional error patent on the face of the proceedings. State v. Bradford, 268 So.2d 781 (La. 1974); State v. Biagas, 260 La. 69, 255 So.2d 77 (La. 1971).

We therefore consider on its merits the contention of the unconstitutionality of a non-unanimous verdict by a six-person jury.

In Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893 (1970), the United States Supreme Court upheld the constitutionality of the six-person jury in a state criminal trial. The court seemed to express its approval of the retention of unanimity on the six-person jury, but it did not decide the question of whether unanimity is an indispensable element of the Sixth Amendment guarantee to trial by jury.

The question of unanimity of a jury verdict was raised in Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620 (1972). The court there held that Louisiana's twelve-person jury, wherein nine persons (before the 1974 state constitution raised the requirement to ten) must

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or request for instructions, so as to enable the trial court to cure the deficiency; or else is waived. La.C.Cr.P. art. 841.

Nevertheless, in view of the uncertainty of the jurisprudence, and because the constitutional error (if any) is based on a United States Supreme Court decision decided subsequent to the present conviction and is revealed by the minutes, we deem it to be appropriate here to consider the alleged constitutional error first raised in this court, without attempting at this time to resolve the conflicting jurisprudential principles as to whether or not the allegation represents unwaived patent error discoverable by mere inspection of the pleadings and proceedings.

concur to reach a verdict in order to subject a defendant to punishment necessarily at hard labor, did not violate the defendant's right to due process or equal protection.[10]

The 1974 Louisiana constitution provides for a jury of six for lesser felonies, five of whom must concur to render a verdict. Article 1, Section 17. This changed the prior state constitution's provision for a jury of five in such instances, with a requirement of a unanimous verdict (similar to the Georgia jury provision invalidated earlier this year by the United States Supreme Court in *Ballew*).

In his commentary upon the 1974 provision, Professor Lee Hargrave, Coordinator of Research for the constitutional convention, expressed the view that this change to non-unanimity did not offend the federal constitution: "If 75 percent concurrence (9/12) was enough for a verdict as determined in *Johnson v. Louisiana*, 406 U.S. 356 (1972), then requiring 83 percent concurrence (5/6) ought to be within the permissible limits of *Johnson*." Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 La.L.Rev. 1, 56 (fn. 300) (1974).

We accept this view as still valid, despite the recent decision in Ballew v. Georgia, ___ U.S. ___, 98 S.Ct.

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10 This court has previously held that La.C.Cr.P. art. 782's provision for non-unanimous verdicts of twelve-person juries does not offend equal protection of due process of the federal or state constitution (State v. Ledet, 337 So.2d 112 (La. 1976); State v. Ross, 320 So.2d 177 (La. 1975); State v. Bradford, 298 So.2d 781 (La. 1974); State v. Blackwell, 298 So.2d 798 (La. 1974) or a defendant's right to be presumed innocent until found guilty beyond a reasonable doubt. State v. Ledet, supra.

1029 (1978). *Ballew* rejected Georgia's contention that the retention of the unanimity requirement in its five-person jury satisfied the requirements of the federal constitution's guarantee of the right to trial by jury for a criminally accused through the Sixth and Fourteenth Amendments.

In doing so, the court stated: "Our concern has to do with the ability of the smaller group to perform the functions mandated by the Amendments. That a five-person jury may return a unanimous decision does not speak to the questions whether the group engaged in meaningful deliberation, could remember all the important facts and arguments, and truly represented the common sense of the entire community." 98 S.Ct. at 1039-40.

Earlier, in *Williams*, the court had held that a *six*-person jury was of sufficient size to promote adequate group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community. These values, which *Ballew* held a five-person jury is inadequate to serve, are not necessarily defeated because the six-person jury's verdict may be rendered by five instead of by six persons.

The six-person jury will still presumably engage in the longer deliberations involving more communication that the court found adequately enhances greater verdict reliability and better community representation, despite (see *Johnson*) the elimination of the requirement for unanimity in verdict. Or at least this court, indulging in the presumption of federal constitutionality which must be afforded to provisions of our state constitution, so concludes as to this close issue.

We therefore do not find reversible merit to this contention.

IV. *Other Assignments of Error.*

The remaining assignments of error do not require extended discussion:

Assignment 2 concerns a non-erroneous refusal of the trial court, within its discretion, to qualify a witness as an expert entitled to give opinions as to contemporary community standards. The witness's opinion was founded mostly on his discussions with acquaintances involved in the marketing and sale of materials in adult book stores and with their customers. The witness was, however, permitted to testify fully as to the wide availability of similar materials in 25 other outlets in the community, a matter concerning facts within his knowledge. La. R.S. 15:463, 467.

Assignment 3 concerns a non-meritorious technical and narrow objection to the trial court's instructions relative to the definition of "prurient interest".

Assignment 4 objects to the sentencing of both defendants to two consecutive sentences on both counts of the two-count information. The information concerned two separate offenses (showing of two different obscene films); joinder of the separate

offenses is permissible under La.C.Cr.P. art. 493 as amended in 1975. The jurisprudence concerning the issue prior to the 1975 amendment is inapplicable. See, e.g., State v. Todd, 278 So.2d 36 (La. 1973).[11]

Decree

Accordingly, since we find no merit to the defendant's contentions, we affirm the convictions and sentences.

AFFIRMED.

---

11 On appeal, the defendant does not complain, as he did at the time of sentence, that a condition of his probation was to pay $1,000 to the Criminal Court Operations Fund. This condition of probation is now permitted by the amendment of La.C.Cr.P. art. 895.1 by Act 720 of 1977. This permits the court to impose as a condition of probation a requirement that the defendant pay "an amount of money in restitution to defray the cost of the operation of that court." Cf. State v. Rugon, 355 So.2d 877 (La. 1977), invalidating under *then*-existing (pre-1977) legislation an apparently similar condition of probation.

A MOTION TO DISPENSE WITH THE PRINTING OF THE APPENDIX WAS MADE AND GRANTED.

Supreme Court, U. S.
FILED
OCT 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-90

DANIEL BURCH
and WRESTLE, INC.,
Petitioners,

versus

STATE OF LOUISIANA,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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STATEMENT OF THE CASE

Unless otherwise noted in argument, respondent concedes that the facts as set forth in petitioners' application and the opinion of the Louisiana Supreme Court are correct.

ARGUMENT

With one exception, which will be explained more fully below, respondent adopts the opinion of the

Louisiana Supreme Court as its reason why this writ application should be denied.

In pertinent part, said opinion is as follows:

"III. *Non-unanimous Six person Jury*

"By brief and argument in this court, the defendants for the first time contend that Louisiana law, which permits conviction by a non-unanimous six-person jury, offends the right of persons criminally accused of non-petty offenses to the jury trial guaranteed them by the Sixth and Fourteenth Amendments to the United States Constitution.[7]

"The defendants base their contention upon Ballew v. Georgia, ___ U.S. ___, 98 S.Ct. 1029 (1978). This decision held that trial before a five-person jury offends federal constitutional rights, even though a unanimous verdict is required.

"Initially, we are given concern because the alleged error was not raised by objection in the trial court at the time of the jury trial, La.C.Cr.P. art. 841, nor assigned as error, La.C.Cr.P. art. 920. It thus cannot be the subject of appellate review unless the error "is dis-

7 The right of a defendant in a criminal proceeding to a trial by jury guaranteed by the Sixth Amendment was held to be applicable to state criminal proceedings by virtue of the Fourteenth Amendment in Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444 (1968).

coverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." La.C.Cr.P. art. 921(2).

"Historically, our jurisprudence does not permit inspection of the trial transcript to ascertain such errors, see State v. Craddock, 307 So.2d 342 (La. 1975), but only of the pleadings and proceedings alone considered part of the record for purposes of patent-error appellate review — in general, the indictment or information, the minutes, and the verdict and sentence.[8]

"In this case, the minute entry shows that, after the jury brought in verdicts convicting both defendants of both counts, the jury was polled and had found the defendant Burch guilty by a vote of 5-1. Although the matter is not free from doubt[9], we have held without discussion that under such circumstances we may,

8 In State v. Sanford, 248 La. 630, 181 So.2d 50 (1965) we summarized the jurisprudence as holding that the record of the pleadings and proceedings, for purposes of determining patent error, 'includes the caption in the case, a statement of time and place of holding the court, the indictment or information with the endorsement, the arraignment, the plea of the accused, mention of the impaneling of the jury, verdict, and judgment of the court." 181 So.2d 51.

9 The essential basis for the defendants' contention is their attack on the constitutionality, under the federal constitution, of the provisions of state law which permit a non-unanimous verdict in six-person juries: La. Const. of 1974, Art. 1, Section 17; La.C.Cr.P. art. 782.

On the one hand, some jurisprudence provides that the grounds of unconstitutionality must first be asserted in the trial court. State v. Campbell, 263 La. 1058, 270 So.2d 506 (1973); State v. Kavanaugh, 203 La. 1, 13 So.2d 366 (1943);

from the minute entry, discover by mere inspection the basis for a defendant's contention that a non-unanimous jury verdict represents constitutional error patent on the face of the proceedings. State v. Bradford, 268 So.2d 781 (La. 1974); State v. Biagas, 260 La. 69, 255 So.2d 77 (La. 1971).

"We therefore consider on its merits the contention of the unconstitutionality of a non-unanimous verdict by a six-person jury.

"In Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893 (1970), the United States Supreme Court

City of Shreveport v. Pedro, 170 La. 351, 127 So. 865 (1930). On the other hand, the unconstitutionality of a statute *on which a conviction is based* may be noticed as patent error. State v. Stewart, 325 So.2d 828 (La. 1976). Yet, if a defendant withdraws in the trial court his attack upon the constitutionality of such a statute, his waiver precludes appellate review of (what under *Stewart* is patent constitutional) error in this regard. State v. Jones, 347 So.2d 200 (La. 1977).

We make no effort here to reconcile these conflicting principles enunciated by our jurisprudence. Arguably, although a noncurable attack upon the substantive statute upon which a conviction is based may be noticed at any time, a procedural deficiency (such as the alleged statutory provision for a non-unanimous jury verdict) should be raised in the trial court by appropriate motion or request for instructions, so as to enable the trial court to cure the deficiency; or else is waived. La.C.Cr.P. art 841.

Nevertheless, in view of the uncertainty of the jurisprudence, and because the constitutional error (if any) is based on a United States Supreme Court decision decided subsequent to the present conviction and is revealed by the minutes, we deem it to be appropriate here to consider the alleged constitutional error first raised in this court, without attempting at this time to resolve the conflicting jurisprudential principles as to whether or not the allegation represents unwaived patent error discoverable by mere inspection of the pleadings and proceedings.

upheld the constitutionality of the six-person jury in a state criminal trial. The court seemed to express its approval of the retention of unanimity on the six-person jury, but it did not decide the question of whether unanimity is an indispensable element of the Sixth Amendment guarantee to trial by jury.

"The question of unanimity of a jury verdict was raised in Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620 (1972). The court there held that Louisiana's twelve-person jury, wherein nine persons (before the 1974 state constitution raised the requirement to ten) must concur to reach a verdict in order to subject a defendant to punishment necessarily at hard labor, did not violate the defendant's right to due process or equal protection.[10]

"The 1974 Louisiana constitution provides for a jury of six for lesser felonies, five of whom must concur to render a verdict. Article 1, Section 17. This changed the prior state constitution's provision for a jury of five in such instances, with a requirement of a unanimous verdict (similar to the Georgia jury provision

10 This court has previously held that La.C.Cr.P. art. 782's provision for non-unanimous verdicts of twelve-person juries does not offend equal protection of due process of the federal or state constitution (State v. Ledet, 337 So.2d 112 (La. 1976); State v. Ross, 320 So.2d 177 (La. 1975); State v. Bradford, 298 So.2d 781 (La. 1974); State v. Blackwell, 298 So.2d 798 (La. 1974) or a defendant's right to be presumed innocent until found guilty beyond a reasonable doubt. State v. Ledet, supra.

invalidated earlier this year by the United States Supreme Court in *Ballew*).

"In his commentary upon the 1974 provision, Professor Lee Hargrave, Coordinator of Research for the constitutional convention, expressed the view that this change to non-unanimity did not offend the federal constitution: "If 75 percent concurrence (9/12) was enough for a verdict as determined in *Johnson v. Louisiana*, 406 U.S. 356 (1972), then requiring 83 percent concurrence (5/6) ought to be within the permissible limits of *Johnson*." Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 La.L.Rev. 1, 56 (fn. 300) (1974).

"We accept this view as still valid, despite the recent decision in Ballew v. Georgia, ___ U.S. ___, 98 S.Ct. 1029 (1978). *Ballew* rejected Georgia's contention that the retention of the unanimity requirement in its five-person jury satisfied the requirements of the federal constitution's guarantee of the right to trial by jury for a criminally accused through the Sixth and Fourteenth Amendments.

"In doing so, the court stated: 'Our concern has to do with the ability of the smaller group to perform the functions mandated by the Amendments. That a five-person jury may return a unanimous decision does not speak to the questions whether the group engaged in meaningful deliberation, could remember all

the important facts and arguments, and truly represented the common sense of the entire community.' 98 S.Ct. at 1039-40.

"Earlier, in *Williams*, the court had held that a *six*-person jury was of sufficient size to promote adequate group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community. These values, which *Ballew* held a five-person jury is inadequate to serve, are not necessarily defeated because the six-person jury's verdict may be rendered by five instead of by six persons.

"The six-person jury will still presumably engage in the longer deliberations involving more communication that the court found adequately enhances greater verdict reliability and better community representation, despite (see *Johnson*) the elimination of the requirement for unanimity in verdict. Or at least this court, indulging in the presumption of federal constitutionality which must be afforded to provisions of our state constitution, so concludes as to this close issue.

"We therefore do not find reversible merit to this contention."

State v. Wrestle, Inc. & Daniel Burch, ___ So.2d ___ (La. 1978).

The single exception noted above is this: since the verdict of the jury against petitioner, Wrestle, Inc., was unanimous, this petitioner is without standing to complain of the alleged unconstitutionality of the Louisiana procedural laws in question. Alternatively, as to Wrestle, Inc., the issue is moot.

CONCLUSION

The State of Louisiana therefore respectfully prays that petitioner's Application For A Writ of Certiorari to the Louisiana Supreme Court be denied and that the judgment of the Louisiana Supreme Court herein, affirming the convictions and sentences of petitioners, be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Response To Petition For A Writ Of Certiorari To The Supreme Court of Louisiana has been served upon petitioners by placing a copy of same in the United States mail, postage prepaid, addressed to:

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Supreme Court, U. S.
FILED
DEC 11 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

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versus

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the
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BRIEF FOR THE PETITIONERS

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IN THE
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On Writ of Certiorari to the
Supreme Court of Louisiana

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the Supreme Court of the State of Louisiana is reported at 360 So.2d 831 (1978). A printed copy is filed with the appendix to the petition for writ of certiorari.

JURISDICTION

The judgment of the Louisiana Supreme Court was entered on June 19, 1978. No application for rehearing

was filed. The petition for certiorari was filed less than ninety days later.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Whether conviction by a non-unanimous six-person jury offends the right of persons criminally accused of non-petty offenses to the jury trial guaranteed them by the Sixth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

The Constitution of the United States, Amendment XIV, Section 1: ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

The Constitution of the State of Louisiana, Article I, Section 17: " . . . A case in which the punishment may be confinement at hard labor or confinement without

hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. . . ."

Louisiana Revised Statutes 14:106: "G. Whoever commits the crime of obscenity shall be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned in the parish prison for not more than one year, or both. . . ."[1]

STATEMENT

Petitioners, an individual and a Louisiana corporation, were convicted on two counts each by a six-person jury in the Criminal District Court for the Parish of Orleans, State of Louisiana, of the crime of obscenity. The bill of information charged violation of the State Obscenity Statute, LSA R.S. 14:106, by showing obscene movies through a coin-operated picture machine in downtown New Orleans on May 24, 1977.

After the jury brought in verdicts convicting both defendants of both counts, the jury was polled and had found the defendant Burch guilty by a vote of 5 -1 and the defendant Wrestle, Inc. guilty by a unanimous verdict. Opinion, Louisiana Supreme Court, Appendix to Petition for Certiorari, pps. 2a, 11a; *State v. Wrestle, Inc., et. al.*, 360 So.2d 831, at 833, 837.

---

1 Louisiana's Obscenity Statute was amended subsequent to the filing of the bill of information herein, and the pertinent part of the penalty provision now reads: "G. Whoever commits the crime of obscenity shall be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned for not more than one year with or without hard labor, or both." As amended by Acts 1977, No. 717, Sec. 1.

Burch was sentenced to serve two consecutive seven month terms in parish prison, suspended, and placed on inactive probation for two years for each count, to be served concurrently; a condition of the probation was that he pay $1,000 to the judicial expense fund. Wrestle, Inc., was sentenced to pay a fine of $600 on each count. Defendants timely appealed to the Louisiana Supreme Court.

After the trial but prior to argument on appeal this Court decided *Ballew v. Georgia,* 435 U.S. 223, 98 S. Ct. 1029 (1978), holding that a criminal trial in a non-petty case to a jury of only five persons deprives the accused of his right to trial by jury. This holding was urged by defendants on appeal before the Louisiana Supreme Court. That Court, holding that Defendants' contentions alleged error patent on the face of the proceedings (Appendix, Petition for Certiorari, p. 12a), considered on its merits the contention of the unconstitutionality of a non-unanimous verdict by a six-person jury. The Court held that, though the issue was close, it would "indulg[e] in the presumption of federal constitutionality which must be afforded to provisions of our state constitution . . ." (Appendix, Petition for Certiorari, pps. 14a, 15a), and held that petitioners' federal constitutional rights had not been violated.

SUMMARY OF ARGUMENT

The decision of the Louisiana Supreme Court upholding the validity of the Louisiana six person non-

unanimous jury in serious criminal cases is in error, because such a jury substantially endangers the constitutional requisites for juries set forth in *Williams v. Florida,* 399 U.S. 78 (1970) and *Ballew v. Georgia,* 435 U.S. 223 (1978).

In *Ballew,* this Court listed several "concerns" which militated against the constitutional validity of the five member unanimous jury in Georgia. Among those concerns were that a jury that small, even though requiring a unanimous verdict, did not assure a fair possibility for representing a cross section of the community and endangered effective group deliberation. Further, a jury that small created an imbalance detrimental to the defense.

The constitutional invalidity of a five member panel cannot be cured by adding another person to the jury as long as that sixth member's vote is not required in order to return a verdict. The combination of non-unanimity and reduced panel size violates the original theories leading to findings that the deviations from the traditional twelve member unanimous model were justified.

These conclusions are compelled both by social science data compiled since *Williams v. Florida* was decided in 1970 and by common sense. An example of such a common sense conclusion is that a defendant's chances for a hung jury under the Louisiana system are less than under the Georgia system condemned in *Ballew,*

because whereas Georgia required all five jurors to concur Louisiana requires only that five of six jurors agree.

No state interest counterbalances or justifies the threat to the right to a jury trial inherent in the Louisiana non-unanimous reduced panel model. All six jurors must still be paid and the money saved by shortened jury deliberation periods and fewer retrials resulting from fewer hung juries does not justify the threat to the sixth amendment right to a trial by jury.

ARGUMENT

Prior to 1974 Louisiana law provided for a jury of five for lesser felonies, with a requirement for a unanimous verdict. The law then was substantially similar to the Georgia jury provision invalidated earlier this year by this Court in *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029 (1978). The new 1974 Louisiana constitution changed this requirement by adding a sixth juror, though requiring that only five must concur to render a verdict. Article I, Section 17. It is submitted that the principles and considerations which caused this Court to invalidate the Georgia jury provision in *Ballew* apply with equal if not greater force to the Louisiana provision for a non-unanimous six-person jury.

In *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893 (1970) this Court held that a six-man jury did not violate Sixth Amendment rights, because such a jury should

probably be large enough to promote group deliberation and should provide a fair possibility for obtaining a representative cross-section of the community. The Court stated:

> "But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers twelve — *particularly if the requirement of unanimity is retained.*" (emphasis added)
>
> 90 S. Ct. 1893, at 1906

In Louisiana, since unanimity is not required in a six-man jury, the question arises as to whether the goals mentioned by this Court will be met by permitting conviction upon the agreement of five of the six jurors.

I.

A Non-Unanimous Six Person Jury Presents A Substantial Threat To The Right To Trial By Jury, Because The Reduction Of The Size Of The Voting Majority Required To Reach A Verdict To A Number Below Six Endangers A Fair Possibility For Representing A Cross Section Of The Community And Endangers Effective Group Deliberation.

This Court has held that criminal convictions are constitutionally permissible when rendered by both

non-unanimous twelve person juries, *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972), and six-person unanimous juries, *Williams v. Florida*, 399 U.S. 78 (1970), yet invalid when rendered by unanimous five person juries, *Ballew v. Georgia*, 435 U.S. 223 (1978). It is submitted that the invalidity of a five person unanimous panel cannot be cured by adding another person to the jury without insuring that the contributions of the additional member will be manifested in the final verdict that emerges from the deliberative process.

During the eight year period between *Williams v. Florida* and *Ballew v. Georgia*, reams of social science data had been compiled comparing and contrasting various attributes of six and twelve person juries. In announcing the judgment of the Court in *Ballew*, Mr. Justice Blackmun reviewed many of the findings of this empirical research. Included among these were the following:

1. Recent empirical data suggest that as juries become progessively smaller, they are less likely to promote effective group deliberation, which eventually leads to inaccurate factfinding and incorrect application of community common sense. 98 S. Ct. at 1035.

2. Current data raise doubts about the ability of smaller juries to determine accurate results. 98 S. Ct. at 1036. For example, the risk of convicting an innocent person increases as the size of the jury diminishes. 98 S.

Ct. at 1036, noting Friedman, *Trial by Jury: Criteria for Convictions, Jury Size and Type I and Type II Errors*, 26-2 Am. Stat. 21 (April 1972) and Nagel & Neef, *Deductive Modeling to Determine an Optimum Jury Size and Fraction Required to Convict*, 1975 Wash. U.L.Q. 933.

3. The data suggest that as juries become smaller, there is greater variance in verdicts, amounting to an imbalance detrimental to the defense. 98 S. Ct. at 1037. For example, the frequency of hung juries decreases when juries are reduced in size. 98 S. Ct. at 1037, citing Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U.Chi. L. Rev. 710 (1971) and Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 Mich. L. Rev. 643 (1975) [hereinafter cited as Lempert].

4. Because minority representation diminishes as jury size decreases, the Court stated that this trend "foretells problems not only for jury decisionmaking, but also for the representation of minority groups in the community." 98 S. Ct. at 1037, citing Lempert.

Mr. Justice Blackmun concluded that "(A)ny further reduction that promotes inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance." *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029, 1039 (1978).

The significant feature of petitioners' case, unique among the cases heretofore discussed, is the combination of non-unanimity and reduced panel size. It is submitted that the application of the non-unanimity feature in the six member panel context violates the original theories leading to the findings of permissibility of the reduced jury size and the abandonment of the unanimity requirement. The justifications for each of these deviations from the traditional twelve member unanimous model are mutually exclusive, but fail when applied in unison.

A. The Louisiana Panel Endangers Adequate Jury Deliberation

The Court's first concern in *Ballew* was that a change in the number of jurors should not affect the group's method or manner of discussion. 435 U.S. at 232. *Ballew* concluded that six is the least possible number of jurors necessary for effective group deliberation when the product of the deliberative process must be a unanimous verdict. 435 U.S. at 240. If sequestering six jurors until unanimous agreement is reached is the bare minimum for insuring effective and meaningful group deliberation, abolishing the unanimity requirement in this context means that the lowest standard is no longer met. This is the necessary conclusion unless one accepts the suggestion that there is absolutely no difference in the intensity of the debate that must persuade six out of six as contrasted with five out of six jurors. This assertion is certainly contrary to a normal

expectation of human behavior. See: dissent of Mr. Justice Douglas in *Johnson v. Louisiana*, 406 U.S. at 389.

Moreover, recent empirical studies have demonstrated the impact the removal of the unanimity requirement has on jury processes. A comparison of the deliberation times between mock juries required to act unanimously and those required to act by two-thirds vote showed deliberation times were expedited when unanimity was not required. Davis, et al., *The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J. Pers. and Soc. Psych. 1 (1975). These findings suggest that only a limited consideration may be given to dissenting views if those viewpoint holders are not necessary for the group's verdict. *Id.* at 12.

Empirical evidence has also shown that the keen analysis which should be given to all viewpoints during jury deliberation is likely to be substantially less when an opinion is expressed by only one member of a group than when the same viewpoint is expressed by two members of the group, even if the absolute group size is doubled. Therefore, when the Louisiana Supreme Court argues that "If 75 percent concurrence (9/12) was enough for a verdict as determined in *Johnson v. Louisiana*, 406 U.S. 356, [92 S. Ct. 1620, 32 L.Ed.2d 152] (1972), then requiring 83 percent concurrence (5/6) ought to be within the permissible limits of Johnson," *State v. Wrestle, Inc., et al.*, 360 So.2d 831, 838; p. 13a, Appendix, pet. for cert., it ignores this fact.

A mere comparison of percentages, with nothing more, overlooks a fundamental distinction between the two variations. The distinction arises because of the psychological evidence that demonstrates the importance to the proponent of a minority viewpoint of having at least one ally when presenting his arguments to the majority. Lempert, *Id.* at 674. Beginning with the Asch experiments reported in the 1950's (Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, in *Group Dynamics* 189 (2d ed. D. Cartwright & A. Zander, 1960), it has been shown that the likelihood of a sole dissenter maintaining his or her position in the face of a substantial majority opposed to his view is slim at best. See Lempert, *Id.* at 674-78; Saks, *Ignorance of Science Is No Excuse*, 10 Trial 18, 19 (Nov.-Dec. 1974).

Even if the minority viewholder maintains a contrary view, a grave danger exists that when faced with the majority view, this sole dissenter will change his overt opinion so as to avoid appearing different. When the dissenter has at least one ally, however, "the conformity rates . . . fell off dramatically, even though the subjects continued to face absolutely large majorities against them." Lempert, at 674. If the minority view is held by only one out of six jurors, as opposed to two or three out of twelve jurors, a grave danger exists that the rationale of the minority viewpoint will not be fully and effectively presented to the majority viewholders.

B. *The Louisiana Panel Creates an Imbalance Detrimental to the Defense*

An additional concern expressed by Mr. Justice Blackmun in *Ballew* was the danger in reducing the size of the jury that the chance for hung juries would decline, thus creating "an imbalance to the detriment of one side, the defense." 435 U.S. at 236. The data the Court relied upon to demonstrate the lesser chance for a hung jury that results if the number of jurors was reduced below six even more strikingly demonstrates the danger that occurs to an accused's chance for a hung jury when the requirement of unanimity is removed from the six member panel. See Lempert, at 676-77; Zeisel, *And Then There Were None: The Diminution of the Federal Jury*, 38 U.Chi. L. Rev. 710, 719-20 (1971); Note, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida*, 22 Case W. Res. 529, 547 (1971); see generally H. Kalven & H. Zeisel, *The American Jury* at 453-63 (3d ed. 1966). If five out of five does not offer sufficient protection for an accused, five out of six offers him even less protection.

C. *The Louisiana Panel Adversely Affects Minority Representation*

Finally, it is submitted that the requirement enunciated in *Williams v. Florida*, 399 U.S. at 100, that a verdict be rendered by a jury composed of a representative cross section of the community is thwarted if non-unanimity is permitted on the six member jury panel.

The Court in *Ballew* concluded that the opportunity for meaningful representation of minority groups is decreased below the constitutional minimum when the jury is composed of only five members. 435 U.S. at 236-37, 238; see also, opinion of Mr. Justice White concurring in *id.* at 245. If the jury's verdict is concurred in by only five jurors and these five members could not render a constitutionally valid verdict if acting alone because they do not provide a fair possibility for obtaining a representative cross section of the community, the addition of a sixth non-mandatory vote on the panel will likely not improve it. At the very least, permitting non-unanimity in this context creates some uncertainty as to whether the essential purposes behind the cross sectional requirement are being fulfilled or whether minority representation is merely a meaningless and empty formality. As Mr. Justice Stewart stated in his dissent in *Johnson v. Louisiana:*

> For only a unanimous jury so selected [i.e., by an impartial system] can serve to minimize the potential bigotry of those who might convict on inadequate evidence, or acquit when evidence of guilt was clear . . . . The requirements of unanimity and impartial selection thus complement each other in ensuring the fair performance of the vital functions of a criminal court jury.
>
> 406 U.S. 398

It should be noted that there may be no minority representation at all on a six person jury. Mr. Justice Blackmun pointed out that if a minority viewpoint is shared by 10% of the community, over half of six member juries will statistically have *no* minority representation. *Ballew v. Georgia*, 98 S. Ct. at 1037. Thus, even the one non-mandatory dissenter, referred to by Mr. Justice Marshall as a "surplusage" member, *Johnson v. Louisiana*, 406 U.S. at 400-01, may not be present to try to persuade the five person majority to consider minority views.

An additional consideration affecting the cross sectional requirement in this case is the nature of the charge, obscenity, based upon the display of films presumptively protected by the First Amendment. In *Miller v. California*, 413 U.S. 15 (1973), this Court eliminated the requirement for national standards and adopted the view that obscenity should be determined by local community standards as viewed by the average person. The purpose of this standard was stated by the Court to be that:

> "So far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person — or indeed a totally insensitive one."
>
> 413 U.S. at 33

The Court in *Miller* made clear that the lay jurors, as ultimate factfinders, could rely upon their own experience in determining what was obscene. The necessity for obtaining an adequate cross section of the community is thus heightened in obscenity cases in order to obtain a more reliable reflection of the views of the "average person" in the community rather than particularly susceptible or totally insensitive citizens.

For the foregoing reasons, it is submitted that the application of the principles set forth in *Ballew v. Georgia* invalidates the Louisiana six person non-unanimous jury in serious criminal cases.

II.

No State Interest Counterbalances Or Justifies The Substantial Threat To Sixth And Fourteenth Amendment Guarantees Resulting From The Louisiana Six Person Non-Unanimous Criminal Jury.

Mr. Justice Blackmun indicated in *Ballew* that even if a given change in the structure of the jury "inhibits the functioning of the jury as an institution to a significant degree," that change may nevertheless be justifiable if "any state interest counterbalances and justifies the disruption so as to preserve its constitutionality." *Ballew v. Georgia*, 435 U.S. 223, at 231. No such state interest exists in this case.

The only monetary savings that could occur from use of the Louisiana six person jury would be either in the

area of shorter deliberation periods or in the reduction in the number of hung juries that result in the retrying of cases. However, as has been discussed earlier, either one of these situations greatly endangers important sixth amendment values. Therefore, any potential savings that could result from the five out of six jury verdict model are greatly outweighed and counterbalanced by competing considerations that are essential to the proper functioning of the jury.

CONCLUSION

This Court should declare those provisions of Article I, Section 17 of the Louisiana Constitution of 1974 which provide for a non-unanimous jury of six members to be in violation of the right to trial by jury protected by the Sixth Amendment to the United States Constitution. The convictions of petitioners Daniel Burch and Wrestle, Inc. should be reversed and the case remanded to the Supreme Court of the State of Louisiana.

Respectfully submitted,

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I hereby certify that I have served three copies of the foregoing brief for the petitioners upon respondent herein, the State of Louisiana, by personally handing the copies of said brief to Louise S. Korns, Assistant District Attorney for the Parish of Orleans, State of Louisiana.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-90

DANIEL BURCH and WRESTLE, INC.,
Petitioners,

versus

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the
Supreme Court of Louisiana

BRIEF OF STATE OF LOUISIANA, RESPONDENT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-90

DANIEL BURCH and WRESTLE, INC.,
Petitioners,

versus

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the
Supreme Court of Louisiana

BRIEF OF STATE OF LOUISIANA, RESPONDENT

STATEMENT OF THE CASE

By bill of information the District Attorney of Orleans Parish jointly charged Wrestle, Inc. and Daniel W. Burch, in the first count, with possession, exhibition, and display of hard-core sexual conduct in an untitled motion picture shown in booth number 9 at 4059 Tulane Avenue, New Orleans, Louisiana, on May 24, 1977, and, in the second count, with possession, exhibition, and display of hard-core sexual conduct in a motion picture entitled "Black Bobbysoxer" on the same date. R. 1.

On September 27, 1977, Wrestle, Inc., and Daniel Burch were jointly tried before a jury of six persons, five of whom could render a verdict under Article 1, Section 17, of the Louisiana Constitution of 1974 and Louisiana Code of Criminal Procedure Article 779 as amended. That same day the six person jury by a vote of 5 to 1 found Daniel Burch guilty as charged on both counts, and by a unanimous vote found Wrestle, Inc., guilty as charged on both counts. R. 10-12. Daniel Burch was sentenced to two consecutive, suspended seven month terms in Parish Prison and Wrestle, Inc., was fined $600.00 on each count. R. 14, 17.

On November 15, 1977, Daniel Burch and Wrestle, Inc., filed a motion for appeal to the Louisiana Supreme Court. R. 24. While their appeal was pending there this Honorable Court on March 21, 1978, handed down its decision in *Ballew v. Georgia*, 435 U.S. 223, declaring unconstitutional under the Sixth and Fourteenth Amendments to the United State Constitution the Georgia law permitting trial by a five person jury, all of whom must concur in the verdict.

On their appeal before the Louisiana Supreme Court Daniel Burch and Wrestle, Inc., on May 16, 1978, filed a First Supplemental Brief in which they attacked the constitutionality of the Louisiana non-unanimous jury of six which had tried their case, citing as authority this Court's recent decision in *Ballew v. Georgia*, supra.

On June 19, 1978, the Louisiana Supreme Court addressed this federal question on its merits and decided

it adversely to Burch and Wrestle's position, citing as authority *Williams v. Florida*, 399 U.S. 78 (1970), and *Johnson v. Louisiana*, 406 U.S. 356 (1972). *State v. Wrestle, Inc.*, 360 So.2d 831 (La. 1978).

Daniel Burch and Wrestle, Inc., applied to this Court for a Writ of Certiorari, which was granted October 30, 1978.

ARGUMENT

I

Plea Of Mootness

The State of Louisiana respectfully reurges the contention it made in its Opposition To Certiorari herein that this matter is moot as far as Wrestle, Inc., is concerned because Wrestle was found guilty as charged by the trial jury of six by a unanimous vote on both counts, and this verdict is unassailable under *Williams v. Florida*, 399 U.S. 78 (1970). See R. 10-12.

II

The Five Out Of Six Verdict Is Constitutional

In the instant proceeding Daniel Burch and Wrestle, Inc., are charged with the crime of obscenity as defined by Article 106 of the Louisiana Criminal Code, La. R.S. 14:106, for which, at the time of the instant crime, the

punishment was a fine of not less than one hundred dollars nor more than one thousand dollars, or imprisonment in the parish prison for not more than one year, or both.

Article 1, Section 17, of the Louisiana Constitution of 1974 pertinently provides that a case in which the punishment may be confinement without hard labor for more than six months shall be tried by a jury of six persons, five of whom must concur to render a verdict. Implementing this constitutional mandate, Article 779 of the Louisiana Code of Criminal Procedure states that a defendant charged with a misdemeanor in which the punishment may be a fine in excess of five hundred dollars or imprisonment for more than six months shall be tried by a jury of six, five of whom must concur to render a verdict.

In *Williams v. Florida*, 399 U.S. 78 (1970), this Court upheld the constitutionality under the Sixth and Fourteenth Amendments of a six person jury in a state criminal trial, pointing out that because the purpose of the jury trial is to prevent oppression by the Government, the essential feature of a jury lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence, and that the performance of this role is not less likely to be achieved when the jury numbers six instead of twelve. 399 U.S. at 100.

Although the opinion in *Williams* seemed to approve of the unanimity requirement of the Florida six person jury there involved, it intimated no view whether or not the requirement of unanimity was an indispensable element of the Sixth Amendment jury trial. See 399 U.S. at 100.

Two years later the issue of the constitutionality of non-unanimous jury verdicts in state criminal trials was squarely presented to this Court in *Johnson v. Louisiana*, 406 U.S. 356 (1972), and *Apodaca v. Oregon*, 406 U.S. 404 (1972), involving, respectively, Louisiana's 9 out of twelve and Oregon's 10 out of twelve jury verdicts. In *Johnson* and *Apodaca* this Court upheld the constitutionality of these state majority verdicts, concluding, pertinently, in *Apodaca*:

> "As we said in *Duncan*, the purpose of trial by jury is to prevent oppression by the Government by providing a 'safeguard against the corrupt or over-zealous prosecutor and against the compliant, biased, or eccentric judge.' *Duncan v. Louisiana*, 391 U.S., at 156. 'Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . . .' *Williams v. Florida*, supra, at 100. *A requirement of unanimity, however, does not materially contribute to the exercise of this commonsense judgment.* As we said in *Williams*, a jury will come to such a

judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt. In terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served." 406 U.S., at 410-411. (Emphasis added)

Mr. Justice Blackmun concurred in *Johnson v. Louisiana*, stating that the majority verdict system is not in his view constitutionally offensive when a substantial majority of the jury, such as the 75% that must concur in a 9-3 verdict, are to be convinced. 406 U.S., at 366; see also Hargrave, The Declaration Of Rights Of The Louisiana Constitution Of 1974, 35 La.L.Rev. 1, 56, n. 300 (1974) ("If 75 per cent concurrence (9/12) was enough for a verdict as determined in *Johnson v. Louisiana*, 406 U.S. 356 (1972), then requiring 83 per cent concurrence (5/6) ought to be within the permissible limits of *Johnson*.")

The following year, in *Colgrove v. Battin*, 413 U.S. 149 (1973), this Court upheld the six-person jury in civil cases, saying, pertinently:

> "We had no difficulty reaching the conclusion in *Williams* that a jury of six would guarantee an accused the trial by jury secured by Art. III and the Sixth Amendment. Significantly, our determination that there was 'no discernible difference between the results reached by the two different-sized juries,' 399 U.S., at 101, drew largely upon the results of studies of the operations of juries of six in civil cases. Since then, much has been written about the six-member jury, but nothing that persuades us to depart from the conclusion reached in *Williams*." 413 U.S., at 158-159 (footnotes omitted)

This Court's recent decision in *Ballew v. Georgia*, 435 U.S. 223 (1978), declaring Georgia's five member jury invalid under the Sixth and Fourteenth Amendments, in no way affects the principles laid down in *Williams v. Florida** that a six member jury is "large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community." 399 U.S., at 100. These essential features,

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* In *Ballew* Mr. Justice Blackmun said, ". . . we adhere to, and reaffirm our holding in *Williams v. Florida* . . . ." *Ballew v. Georgia*, 435 U.S., at 239.

which this Court determined in *Ballew* did not exist in a five person jury, are in no way changed, diminished, or altered because the six member jury can render a verdict of guilt or innocence by a vote of five of its members instead of the entire six. This verdict of five out of 6 takes place after group deliberation by a body of individuals empaneled in a fashion approved by this Court in *Williams*. As this Court held in *Apodaca*, a requirement of unanimity does not materially contribute to the exercise of the commonsense judgment of the group of laymen who comprise a jury. 406 U.S., at 410.

Justice Tate, in his opinion in the Louisiana Supreme Court in this case upholding the constitutionality of Louisiana's five out of 6 jury verdict, concluded:

> "The six-person jury will still presumably engage in the longer deliberations involving more communication that the court found adequately enhances greater verdict reliability and better community representation, despite (see *Johnson*) the elimination of the requirement for unanamity in verdict." *State v. Wrestle, Inc.*, 360 So.2d 831 (1978), at 838.

REBUTTAL

In brief to this Court petitioners contend that the decision of the Louisiana Supreme Court in this case upholding the validity of the Louisiana six person non-unanimous jury is erroneous "because such a jury sub-

stantially endangers the constitutional requisites for juries set forth in *Williams v. Florida*, 399 U.S. 78 (1970) and *Ballew v. Georgia*, 435 U.S. 223 (1978)." P. 5. In support of this argument petitioners rely on empirical data referred to in Mr. Justice Blackmun's opinion announcing the judgment of the Court in *Ballew v. Georgia*, which struck down as too small a unanimous Georgia jury of five.

Petitioners' contention overlooks the fact that Mr. Justice Blackmun's opinion in *Ballew* specifically and explicitly reaffirmed this Court's holding in *Williams v. Florida* that a jury composed of six members, such as the Louisiana jury here at issue, is sufficiently large to promote adequate group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community. Furthermore, petitioners' theory that because five of the 6 members of the Louisiana jury which tried them could return a verdict of guilt or innocence (and did in Daniel Burch's case) the dissenting juror's voice is nullified, was rejected by this Court in *Johnson v. Louisiana*, in which this Court said pertinently:

> "We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict. On

the contrary it is far more likely that a juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction. A majority will cease discussion and outvote a minority only after reasoned discussion has ceased to have presuasive effect or to serve any other purpose — when a minority, that is, continues to insist upon acquittal without having persuasive reasons in support of its position. At that juncture there is no basis for denigrating the vote of so large a majority of the jury or for refusing to accept their decision as being, at least in their minds, beyond a reasonable doubt. Indeed, at this point, a 'dissenting juror should consider whether his doubt was a reasonable one . . . (when it made) no impression upon the minds of so many men, equally honest, equally intelligent with himself.' *Allen v. United States,* 164 U.S. 492, 501 (1896). Appellant offers no evidence that majority jurors simply ignore the reasonable doubts of their colleagues or otherwise act irresponsibly in casting their votes in favor of conviction, and before we alter our own long-standing perceptions about jury behavior and overturn a considered legislative judgment that unanimity is not essential to reasoned jury verdicts, we must have some basis for doing so other than unsupported assumptions." 406 U.S., at 361-362.

In the instant case the jury of six deliberated for approximately 50 minutes (from 5:35 to 6:24 p.m., R. 12) before returning a verdict of 6-0 against Wrestle, Inc., on both counts, and a verdict of 5-1 against Daniel Burch on both counts, R. 12. It is thus unrealistic to argue that the thoughts and opinion of the lone juror who did not join in the guilty verdict against Daniel Burch were ignored and disregarded by his fellow members.

In regard to petitioners' reliance on empirical data in support of their position, there is equally strong empirical data which militate against it. As Mr. Justice Brennan pointed out in his opinion for the Court in *Colgrove v. Battin,* supra, opinion is sharply divided among law review and other commentators concerning the effectiveness of the six-member jury. 413 U.S., at 159-160, n. 15. In general, although the division is not an absoiute one, the jury studies which are based on information resulting from observation of actual criminal court proceedings — "real life", that is, — tend to approve of the smaller jury and the majority verdict, whereas those grounded on deductive modeling, mock juries, etc., are critical of the six-member group and the non-unanimous verdict. See, among others, Nagel & Neef, Deductive Modeling To Determine An Optimum Jury Size And Fraction Required To Convict, 1975 Wash.U.L.Q. 933; Saks, Ignorance Of Science Is No Excuse, 10 Trial 18 (Nov. - Dec. 1974); Thompson, Six Will Do, 10 Trial 12 (Nov. - Dec. 1974); Zeisel, Twelve Is Just, 10 Trial 13 (Nov. - Dec. 1974); Zeisel & Diamond, "Convincing Empirical Evidence" On The Six Member Jury, 41 U.Chi.L.Rev. 281 (1974); Note, The

Effect Of Jury Size On The Probability Of Conviction: An Evaluation Of *Williams v. Florida*, 22 Case W.Res.L.Rev. 529 (1971); Lempert, Uncovering "Nondiscernible" Differences: Empirical Research And The Jury-Size Cases, 73 Mich.L.Rev. 644 (1975); Bogue & Frik, The Six Man Jury, 17 S.D.L.Rev. 285 (1972); Pabst, Statistical Studies Of The Cost Of Six-Man Versus Twelve-Man Juries, 14 Wm. & Mary L.Rev. 326 (1972); Berman & Coppock, Outcomes Of Six- and Twelve-Member Jury Trials: An Analysis Of 128 Civil Cases In The State Of Washington, 48 Wash.L.Rev. 593 (1973); Wiehl, The Six Man Jury, 4 Gonz.L.Rev. 35 (1968); Comment, Defendant's Right To A Jury Trial - Is Six Enough?, 59 Ky.L.J. 996 (1971); Devitt, The Six Man Jury In Federal Court, 53 F.R.D. 273 (1971); Powell, Reducing The Size Of Juries, 5 U.Mich.J.L. Reform 87 (1971); Mills, Six-Member And Twelve-Member Juries: An Empirical Study Of Trial Results, 6 U.Mich.J.L. Reform 671 (1973); Kessler, An Empirical Study Of Six- And Twelve-Member Jury Decision-Making Processes, 6 U.Mich.J.L.Reform 712 (1973); Croake, Memorandum On The Advisability And Constitutionality Of Six Man Juries And 5/6 Verdicts In Civil Cases, 44 N.Y. State B.J. 385 (1972).

There is no evidence that jury deliberation requires more than six people, or that six individuals cannot effectively carry out the decision-making process. In fact, some studies support the view that discussion is stimulated and made more open by reducing the size of

the group, since group members are less likely to consider the other members as an audience when they participate with fewer people, whereas in larger groups shy or tense persons tend to avoid discussion. See Wiehl, The Six Man Jury, 4 Gonz.L.Rev. 35, 39 (1968); Berman & Coppock, Outcomes Of Six- And Twelve-Member Jury Trials: An Analysis Of 128 Civil Cases In The State Of Washington, 48 Wash.L.Rev. 593, 596 (1973); Powell, Reducing The Size Of Juries, 5 U.Mich. J.L. Reform 87, 102-103 (1971).

Further, as this Court stated in *Johnson v. Louisiana*, there is no evidence that majority jurors ignore the reasonable doubts of their colleagues or otherwise act irresponsibly in casting their votes in favor of conviction. 406 U.S., at 362. And The Honorable Lloyd L. Wiehl, Judge of the Superior Court of Yakima County, Washington, has suggested that ". . . five out of six should be able to reach a verdict with as much give-and-take as ten out of twelve." 4 Gonz.L.Rev., at 39 (1968).

THE STATE INTEREST

It is well known that if allowed to deliberate long enough a jury reaches a unanimous verdict in approximately 95 percent of all cases, and that in approximately 5 percent of all unanimous verdict cases the jury hangs. See Nagel & Neef, Deductive Modeling To Determine An Optimum Jury Size And Fraction Required To Convict, 1975 Wash.U.L.Q. 933, 934; Kalven & Zeisel, The American Jury, 56-58, 461 (1966).

Although the majority jury vote actually affects the type of verdict ultimately arrived at in only a small fraction of the cases tried in this manner, the system saves considerable time in all proceedings in which it is used because the jury returns to the courtroom with its verdict as soon as five of its members agree either to convict or acquit, and the number of hung juries declines.

One of the advantages of federalism is that it permits different jurisdictions to function in diverse ways. This diversity should be fostered and encouraged for the health and resiliency of our society. Further, the courts all over this country, both criminal and civil, are becoming more overworked with each passing year. Louisiana thus has a valid interest in maintaining its 5 out of six jury verdict, not only because of the time this procedure saves everyone connected with the criminal justice process, but also, on the ground of comity, for the reason that Louisiana's distinctive jury system, a product of its Latin heritage, should be maintained, and not be sacrificed to conformity, without strong proof, based on a long-term study of the workings of the Louisiana criminal district courts, that this procedure produces unjust results.

CONCLUSION

The State of Louisiana believes that its six member jury, five of whom can return a verdict, is constitutional under *Williams v. Florida* and *Johnson v. Louisiana*, and respectfully asks this Honorable Court to affirm the judgment of the Supreme Court of

Louisiana in this case holding that the Louisiana law which permits conviction by a non-unanimous six person jury is valid under the Sixth and Fourteenth Amendments to the United States Constitution.

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Supreme Court, U. S.
FILED
DEC 14 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 78-90

DANIEL BURCH and WRESTLE, INC.,

Petitioners,

—v.—

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA, *AMICI CURIAE*

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Askin, S. E. Effects of Group Pressure on the Modification and Distortion of Judgments in Group Dynamics 18 Research and Theory (2d Ed. 1960) ... 18

Blackstone, W. Commentaries Vol. IV ... 25

Davis, Kerr, Atkins, Holt and Meek, The Decision Processes of a 6- and 12- Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules. 32 Journal of Personality 18, and Psychology (1975) 30

Documentary History of the Constitution of the United States, Vol. II 28

The Effect of Jury Size on Probability of Conviction, 22 Case Western Reserve Law Review 529 (1971) 17

Lempert, R. Uncovering the 'Nondiscernible' Differences: Empirical Research and the Jury Size Cases, 73 Michigan Law Review 643 (1975) 17, 20

Nagel, S. and M. Neff, Deductive Modeling to Determine an Optimum Jury Size and Fraction to Convict, 1975 Washington University Law Review 933 (1975) 17, 24, 32

Saks, M. Ignorance of Science Is No Excuse, 10 Trial 18 (November-December, 1974) 19, 23, 36

Schwartz, B. The Bill of Rights: A Documentary History (1971) 11, 12, 14, 28

Scott, A. Holmes v. Walton: The New Jersey Precedent, 1779, 4 American Historical Review 456 (1899) in Schwartz, The Bill of Rights: A Documentary History 1971. 11

Silberman, C. Criminal Violence Criminal Justice (1978) 20

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Zeisel, H. ...And Then There Were None: The Diminution of the Federal Jury, 38 University of Chicago Law Review 710 (1971) 25, 30, 31, 33

In The
SUPREME COURT OF THE UNITED STATES

No. 78-90

DANIEL BURCH and WRESTLE, INC.,
Petitioners,
vs.
STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA, AMICI CURIAE

Interest of Amici Curiae */

American Civil Liberties Union is a nationwide, non-partisan organization of over 200,000 members, dedicated to the protection of the rights enumerated in the Bill of Rights. It is particularly concerned with the fair operation of the criminal justice system, and during its 58-year

*/ Letters from all parties consenting to the filing of this brief have been filed with the Clerk of the Court.

history has stressed the need for the fullest protection of the Constitutional right of trial by jury.

Recent social science scholarship, relied on by the court in Ballew v. Georgia, 435 U.S. 223 (1978), suggests that the factual premises underlying this Court's decisions permitting a reduction in jury size, Williams v. Florida, 399 U.S. 78 (1970), and decisions by less than unanimous juries, Apodaca v. Oregon, 406 U.S. 404 (1972), may have been in error. Moreover, recent historical scholarship also suggests that the number twelve was no mere historical accident, but was an essential part of the jury right: indeed, in the first recorded instance of judicial review in the United States, in 1779, the New Jersey Supreme Court held that a reduction in jury size to less than twelve was "unconstitutional," violating "the right of trial by jury."

We submit this brief to provide the Court with these studies.

Because five to one jury verdicts in criminal cases do not offer defendants the protections of the right to jury trial as established by the Founders - including accuracy, consistency, fairness, and fair representation - amici urges that the judgment of the Louisiana Supreme Court be reversed.

STATEMENT OF THE CASE

Petitioners, an individual and a Louisiana corporation, were convicted of violating the Louisiana obscenity statute, LSA R.S. 14:106, for showing coin-operated movies in New Orleans, alleged to be obscene. The jury found the individual defendant Burch guilty by a five to one vote and the corporate defendant guilty by a unanimous vote. Burch was sentenced to two consecutive seven-month prison terms, which were suspended by the Court, and fined $1,000.

On appeal to the Louisiana Supreme Court, the convictions were affirmed. On the issue of the proportion of the jury needed to convict, the Louisiana Supreme Court found Johnson v. Louisiana dispositive regardless of jury size:

> If 75 percent concurrence (9/12) was enough for a verdict as determined in Johnson v. Louisiana, 406 U.S. 356 (1972), then requiring 83 percent concurrence (5/6) ought to be within the permissible limits of Johnson. Hargrave, The Declaration of Rights of the Louisiana Constitution of 1973, 35 La.L.Rev. 1, 45 (fn. 300)(1974).
>
> We accept this view as still valid, despite the recent decision in Ballew v. Georgia, 435 U.S. 223 (1978).

Appendix to Petition for Certiorari (hereinafter cited as Pet.App.)at 13a.

And, having ruled that this Court's analysis and decision in Ballew were irrelevant to the question of the percentage of jurors necessary to convict, the Court rejected petitioners' contention that Ballew foreclosed verdicts by less than six jurors:

> [I]n Williams, the court had held that a six-person jury was of sufficient size to promote adequate group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community. These values which Ballew held a five-person jury is inadequate to serve, are not necessarily defeated because the six-person jury's verdict may be rendered by five instead of by six persons.
>
> The six-person jury will still presumably engage in the longer deliberations involving more communication that the court found adequately enhances greater verdict reliability and better community representation, despite (see Johnson) the elimination of the requirement for unanimity in verdict. Or at least this court, indulging in the presumption of federal constitutionality which must be afforded to provisions of our state constitution, so concludes as to this close issue.
>
> Pet. App. at 14a-15a.

SUMMARY OF ARGUMENT

The first Congress viewed the right of trial by jury as necessarily requiring a jury of twelve persons. Three leading figures in the first recorded instance of judicial review of a state constitution, in which the New Jersey Supreme Court held a provisions for juries of six persons "unconstitutional" as violative of the New Jersey Constitution providing for "the right of trial by jury," were also principals in the Constitutional Convention and in the first Congress. They would hardly have remained silent if a principle so recently controversial in their own state was being overturned in Philadelphia. Williams v. Florida, 399 U.S. 78 (1970), should be overruled. (Point I.A.).

Reduction of the jury from twelve to six undermines each of the four central purposes of the jury trial right recognized in Williams v. Florida, supra, and Ballew v. Georgia, 435 U.S. 223 (1978). (Point I.B.).

Unanimity was viewed by the Framers as an essential attribute of the historical right of trial by jury, and was incorporated into the constitutional provision securing the right. A majority of this Court has steadfastly agreed. Johnson v. Louisiana,

406 U.S. 356 (1972), and Apodaca v. Oregon, 406 U.S. 404 (1972), should be overruled. (Point I.C.).

Elimination of the requirement of jury unanimity also undermines each of the purposes and functions of the jury system. (Point I.D.).

Even if the Court declines to reconsider its previous decisions sanctioning the six-person jury and the non-unanimous jury, a five to one verdict of a six-person jury undermines exponentially the purposes and functions of the jury system, and is not a "jury verdict" within the meaning of the Sixth and Fourteenth Amendment guarantees. (Point II).

ARGUMENT

I. THIS COURT SHOULD RECONSIDER ITS HOLDINGS IN WILLIAMS V. FLORIDA, JOHNSON V. LOUISIANA, AND APODACA V. OREGON, AND SHOULD RE-ESTABLISH THE NECESSITY, UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, FOR TWELVE-PERSON JURIES ACTING UNANIMOUSLY IN CRIMINAL CASES.

A. The Sixth Amendment Right To Trial By Jury Guarantees A Jury Of Twelve Persons.

In Williams v. Florida, 399 U.S. 78 (1970), the court upheld the constitutionality of six-person juries, calling the selection of the number twelve a "historical accident" in the development of the common law jury. Id. at 89. Amici submit that a more complete examination of the historical record discloses that view to have been in error. 1/

The Williams court relied heavily on changes made in the wording of the Sixth Amendment after it was first introduced by Madison in the House of Representatives.

1/ Here, as in Monell v. New York City Department of Social Services, ___U.S. ___, 56 L.Ed. 611 (1978), a candid reappraisal of "the weakness of the historical evidence [previously] relied on" justifies departure from the rule of stare decisis. Id. at 644 (Powell, J., concurring). Indeed, this case is a fortiorari, for stare decisis has less force in constitutional adjudication than in statutory analysis. Id. at 638.

The original Madison proposal provided:

> The trial of all crimes shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites.
>
> Williams v. Florida, supra at 94.

After the House passed this proposal, the Senate changed the wording because of its objection to the concept of the "vicinage." Madison explained the problem in a letter to Edmund Pendleton, dated September 14, 1789. The letter read in part:

> The Senate have sent back the plan of amendments with some alterations which strike, in my opinion, at the most salutary articles. In many of the States, juries, even in criminal cases, are taken from the State at large: in others, from districts of considerable extent; in very few from the County alone. Hence a dislike to the restraint with respect to vicinage, which has produced a negative on that clause, * * * Several others have had a similar fate. Letter from James Madison to Edmund Pendleton, September 14, 1789, in 1 Letters and Other Writings of James Madison 491 (1865).
>
> Id. at 95, n. 39.

After a conference committee considered the matter, the Amendment was re-worded in its present form, which does not mention freeholders, unanimity or vicinage, or the

"accustomed requisities" of the jury. This Court concluded:

> ... Such action is concededly open to the explanation that the "accustomed requisites" were thought to be already included in the concept of a "jury." But that explanation is no more plausible than the contrary One: that the deletion had some substantive effect. Indeed, given the clear expectation that a substantive change would be effected by the inclusion or deletion of an explicit "vicinage" requirement, the latter explanation is, if anything, the more plausible. Id. at 9

Amici respectfully submit that the re-wording is an insufficient basis on which to conclude that Madison and the other Founders intended to reject 400 years of common law development that had led to the establishment of unanimous twelve-person juries in England and the colonies. For the Framers, the right to trial by jury was one of the natural rights of free men. George III's denial of the right to jury trial by the establishment of vice-admiralty courts, in the period from 1768 to 1774, had been one of the chief complaints against the English crown specified in the Declaration

of Independence. [2/] It is not likely that Madison, Jefferson, and the other Founders would have permitted such a fundamental alteration of the jury trial right as they knew it without considerable discussion and debate.

As Mr. Justice Harlan observed in his dissent in Williams:

> In the context of an amendment notable for its sparseness of language, a more likely explanation of the Senate's action is that it was streamlining the Madison version on the assumption that the most prominent features of the jury would be preserved as a matter of course. This interpretation of the events is supported by the fact that the only specifically objectionable feature of the common-law jury - the vicinage requirement - was pre-empted by language providing for a trial by a jury of the district, thus leaving the remaining attributes undefined in face of the distinct expectation that those charged with interpretation would look to the common law. Nor is this explanation rendered less forceful by the fact, noted by the Court, that "reception" of the common-law jury did not unfailingly mean 12 in

2/ "He has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws; giving his assent to their acts of pretended Legislation: .... for depriving us in many cases of the benefits of Trial by Jury."

> early colonial times. As the Court itself acknowledges, the States that had constitutions in 1787 provided for juries of 12.
> 399 U.S. at 123, n. 9.

But even apart from the ultimatedly inconclusive argument over what the first Congress intended by deletion of the phrase "accustomed requisities" of the jury, positive evidence exists to prove that the Framers in fact did "equate the constitutional and common law characteristics of the jury." Williams, 399 U.S. at 99. In a case commonly accepted as the first instance of judicial review in the newly independent states, the Supreme Court of New Jersey held a state law providing for a six-person jury "unconstitutional," violating "the right of trial by jury."

The case, Holmes v. Walton, [3/] (1779), was an action for condemnation of goods obtained through commercial intercourse with the English. Under the 1775 law, providing for such seizure, either party

3/ See Austin Scott, "Holmes v. Walton: The New Jersey Precedent, 1779" 4 American Historical Review 456 (1899) in B. Schwartz, The Bill of Rights: A Documentary History, 405-410 (1971). As Scott sets forth, Holmes v. Walton is unreported, but the decision of the court and arguments of counsel have been amply reconstructed from historical sources. Id.

could demand a jury, which would consist of six men. The defendants appealed the verdict against them. Among the arguments raised by defense counsel were these:

> For that the jury who tried the said plaint before said justice consisted of six men only contrary to the constitution of New Jersey.
>
> For that proceedings and trial in the said plaint below, and the judgement thereon given were had contrary to the constitution, practices and laws of the land. 4/

The basis for these remarkable arguments was the Constitution of New Jersey, adopted the day independence was declared by the Continental Congress, July 2, 1776, which provided that "the inestimable right of trial by jury shall remain confirmed as a part of the law of this colony, without repeal forever." The assumption that the "right of trial by jury" included twelve jurors as part of its essential nature finds support in previous declarations of the rights of the colonists in New Jersey.5/ Eventually, in 1780, the

4/ Schwartz, supra n. 3.

5/ Chapter XXII of the West Jersey "Concessions and Agreements" of 1676: "The trial of all causes, civil and criminal shall be heard and decided by the verdict of twelve honest men of the neighborhood." The formal declaration of the "Rights and Privileges" passed by the House of East Jersey in 1699 also required that all trials be by a jury of twelve men. Two other acts of the assembly in each of the Jersey provinces show that the right to trial before a jury of twelve men was regarded as fundamental, notably the acts of November, 1681 in West Jersey, and March, 1683 in East Jersey. Schwartz at 407.

law under which the case was tried was declared unconstitutional by the New Jersey Supreme Court. Although the opinion of Chief Justice Brearly has been lost, a contemporaneous petition to the New Jersey House of Assembly complains that "the justices of the Supreme Court have set aside some of the laws as unconstitutional," and a motion made by defense counsel at a new trial of the Holmes case recited the previous holding that "a trial by six men is unconstitutional."

The case is important for two reasons. First, the notion of judicial review of legislative acts was not at that time generally accepted in the colonies, and, in fact, a great protest arose as a result of the claimed usuperation of power by the New Jersey Supreme Court. The New Jersey Court would hardly have embarked on the difficult and novel course of judicial review unless the law at issue, providing for six-man juries, was clearly and unequivocally in violation of the constitutional "right of trial by jury." As the New Jersey Supreme Court explained in 1804:

> This question [whether the court has power to control the operation of an act of the legislature upon the principle of its being contrary to the constitution] was brought forward in the case of Holmes vs.

Walton, arising on what was then called the seizure laws. There it had been enacted that the trial should be by a jury of six men; and it was objected that this was not a constitutional jury; and so it was held; and the act upon solemn argument was adjudged to be unconstitutional and in that case inoperative. And upon this decision the act, or at least that part of it which relates to the six-man jury, was repealed and a constitutional jury of twelve men substituted in its place. This then is not only a judicial decision but a decision recognized and acquiesced in by the legislative body of the State.[6/]

Second, three of the principals involved in Holmes v. Walton became leading figures in both the Constitutional Convention and in the First Congress. The author of the opinion, Chief Justice David Brearly, of the New Jersey Supreme Court, was a representative to the Philadelphia Convention that drafted the Constitution, and he signed the Constitution for New Jersey. William Paterson, the New Jersey Attorney General at the time of the decision, was a member of the Convention, one of the first Senators from New Jersey, and later a Justice of this Court. He also served on the Conference Committee that reconciled the language between the House and Senate versions of the Bill of Rights. Elias Boudinot, the

6/ B. Schwartz, supra n. 3.

successful attorney for the defendants in Holmes, later served in the first Congress where he participated in the House debates on the Bill of Rights.

These three men, fresh from the novel and controversial decision of the New Jersey Supreme Court declaring the six-man jury law unconstitutional, would plainly have done what the Williams court thought they did not do - "equate the constitutional and common law characteristics of the jury," Williams, 399 U.S. at 99. They would hardly have agreed, without debate, to a change in the definition of the word "jury" directly contrary to the definition their highest court had recently held was embodied in the word. The only possible conclusion is that urged by Justice Harlan in Williams: the Framers assumed that "the most prominent features of the jury," including its inclusion of twelve persons," would be preserved as a matter of course," 399 U.S. at 123, n. 9.

Of course, this Court is not bound by the expectations or assumptions of the Framers of the Constitution or the Bill of Rights. The great abstract phrases of the Constitution "due process of law," "equal protection of the laws," "cruel and unusual punishment," take their meaning from the "evolving standards" of a maturing society

Trop v. Dulles, 356 U.S. 86, 101 (1958). But the more specific, concrete terms of our basic charter should not lightly be stripped of their historical meanings. Terms such as "army" or "citizen" or "habeas corpus" or "jury" had specific common law or English antecedents, and must be "interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution." United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898). As Justice Harlan urged in Williams, the number twelve, coming as it did from 400 years of English common law development, was not "mere adornment." 399 U.S. at 125. "The right to trial by jury...has no enduring meaning apart from historical form." Id.

In this context, the approach of this Court in Williams and Johnson proceeded from the wrong premise and placed the burden on the wrong proponent. Given this Court's "limited role in a constitutional democracy," Colgrove v. Battin, 413 U.S. 149, 181 (1972) (Marshall, J., dissenting), it should require those who would depart from specific historical restraints on governmental power to justify the departure. Those who would retain the

protections in the Bill of Rights as the Framers passed them on ought not to carry the burden of justification thrust upon them in Williams. As Justice Marshall commented: "The line must be drawn somewhere, and the difference between drawing it in the light of history and drawing it on an ad hoc basis is, ultimately, the difference between interpreting a constitution and making it up as one goes along." Id. at 181-82.

B. The Sixth Amendment Right To Trial By Jury Guarantees A Jury Of Twelve Persons Because A Twelve-Person Jury Is Essential To The Historical Functions Of The Jury.

This Court's decision in Williams was based in part upon "currently available evidence and theory on the effect of changes in jury size." 399 U.S. at 101. But, as the court recognized in Ballew, research undertaken subsequent to Williams strongly indicates that diminution of the jury below twelve significantly impairs the functioning of the jury. 7/ The Court has recognized four

7/ The studies include R. Lempert, Uncovering 'Nondiscernible' Differences: Emperical Research and the Jury Size Cases, 73 Mich.L.Rev. 643 (1975); S. Nagel and N. Neef, Deductive Modeling to Determine an Optimum Jury Size and Fraction to Convict, 1975 Wash.U.L.Q. 933 (1975); Note, The Effect of Jury Size on the Probability of Conviction, 22 Case W.Res.

(footnote continued on next page)

central purposes in the Sixth and Fourteenth Amendments' jury trial provisions: (1) to provide a fair possibility for obtaining a representative cross-section of the community, Williams, 399 U.S. at 100; (2) to promote effective group deliberation, Id; Ballew, 435 U.S. at 234; (3) to insure accuracy of results, Id. at 234-5; and (4) to avoid serious detriment to the defendant, Id. at 236. Each of these functions have been undermined by the reduction in size of juries from twelve to six.

(1) Representative cross-section of the community

Simple mathematical calculations show that reducing the size of a jury from twelve to six will significantly reduce the members of minority groups that sit on juries. According to one study, the reduction in minority group representation on smaller juries is even larger than one would expect:

L.Rev. 529 (1971); S. E. Askin, Effects of Group Pressure Upon the Modification and Distortion of Judgments, in Group Dynamics Research and Theory (2d Ed. 1960); Davis, Kerr, Atkins, Holt and Meek, The Decision Processes of a 6- and 12- Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules, 32 Journal of Personality and Psychology (1975). See generally, Ballew v. Georgia, 435 U.S. at 231 n. 10.

In asserting that there would be a negligible difference in the ability of 12-member and six-member juries to provide a representative cross-section of the community, the court ignored what is obvious to every social scientist: that when sampling from heterogeneous populations, sample size (12 versus 6) determines how well minority groups in the population will be represented. In sampling from a population stratified 90%/10%, for example, we can predict from our knowledge of sampling theory that 72% of 12-member juries will include one or more members of the minority, but but that only 47% of the 6-member samples will. Still, this is only a statistical prediction, and a sincere empiricist would want to see empirical evidence. In my own experiments on 12-member versus six-member juries I compared the number of large and the number of small juries that had one or more blacks present. Blacks composed 10% of the population from which these jurors were drawn. Instead of the 72% to 47% contrast predicted, I found an 82% to 32% difference. Not many people would term this difference "negligible." M. Saks, "Ignorance of Science is no Excuse," 10 Trial 18, 19 (Nov.-Dec. 1974)(footnote omitted).

Professor Saks' Studies were cited by the court in Ballew, see, e.g., 435 U.S. at 231 n. 10, 237 n. 28.

This result was confirmed in another study, which observed that "because blacks are likely to be under-represented in the sampling frame from which jurors' names are drawn (e.g., voting lists), the degree of under-representation apparent to black parties before courts is likely to be greater than these figures suggest." 8/ And because of the smaller numbers of minority group jurors, racially motivated preemptory challenges will more effectively, and quickly, create all-white juries when juries have fewer members. 9/

Moreover, any doubts about the proper size of the jury should be resolved in favor of twelve-person juries in order to make present-day juries the functional equivalent of common law juries. Indeed, from that functional perspective, a strong argument can be made that juries of more than twelve persons would be required in order to serve the same cross-section of the community function served by juries at common law. A twelve-member jury constituted a much more substantial segment of

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8/ Lempert, supra n. 7, at 669 n. 77.

9/ Minority group members are tried for criminal activity in proportion far exceeding their proportion of the population. See, e.g., Uniform Crime Reports, 1975; Silberman, Criminal Violence, Criminal Justice (1978).

the communicy in 14th Century rural England, or even in London, than does a twelve-member jury in New Orleans today. The population of the United States has grown over fifty times since 1790, and yet we still select, at most, only twelve jurors to represent a fair cross-section of that greatly expanded community.

Amici do not suggest that juries of more than twelve persons are constituitonally required. We do suggest, however, that authorizing juries of less than twelve persons is inconsistent with the function of juries at common law, and that doubts about the proper size of juries should be resolved with attention to the function of the jury, and therefore in favor of twelve-person juries.

(2) Effective Group Deliberation

Studies of the dynamics of group decisionmaking have shown that "there were no conditions under which smaller groups were superior in the quality of group performance and group productivity." Ballew, 435 U.S. at 233, n. 11. As a group is reduced from twelve to six, there are fewer members to make the necessary contributions to solve the problems before them. "As juries decrease in size, then, they are less likely to have members who remember each of

the important pieces of evidence or argument." Id. at 233. Moreover, bias in a smaller group is less likely to be overcome both because there is less group pressure, and because there are likely to be fewer minority group members.

As this Court noted in Ballew, id. at 232, "At some point this decline [in size] leads to inaccurate factfinding and incorrect application of the common sense of the community to the facts." Available studies, cited with approval in Ballew, demonstrate that the erosion of effective deliberations is even greater from twelve to six than from six to five; since the Court has found the latter erosion of constituitonal magnitude, it should review and reverse the decision in Williams, finding the greater erosion constitutionally insubstantial.

(3) Insuring Accuracy of Results

Almost every post-Williams study has concluded that reducing the size of juries from twelve to six will make a difference in jury decisions. As the Court pointed out in Ballew, 435 U.S. at 234-35, one study showed that twelve-person juries reached "correct" conclusions in 83% of the cases before it, while six-person juries came to the "correct" conclusion in only 69% of the

cases. 10/ This Court's summary observes the following other changes:

> Working with statistics described in II. Kalven & II. Zeisel, The American Jury 460 (1966), Nagel and Neef tested the average conviction propensity of juries, that is, the likelihood that any given jury of a set would convict the defendant. They found that half of all 12-person juries would have average conviction propensities that varied by no more than 20 points. Half of all 6-person juries, on the other hand, had average conviction propensities varying by 30 points, a difference they found significant in both real and percentage terms. Lempert reached similar results when he considered the likelihood of juries to compromise over the various views of their members, an important phenomenon for the fulfillment of the commonsense function. In civil trials averaging occurs with respect to damages amounts. In criminal trials it relates to numbers of counts and lesser included offenses. And he predicted that compromises would be more consistent when larg juries were employed. For example 12-person juries could be expected to reach extreme compromises in 4% of the cases, while 6-person panels would reach extreme results in 16% All three of these post-Williams studies, therefore, raise significant doubts about the consistency and reliability of the decisions of smaller juries. Ballew, 435 U.S. at 235 (footnotes omitted).

10/ Saks, supra p. 19, at 86-87.

And another leading study analyzed the significant extent to which jury size affects jury verdicts as follows:

> Assume that a twelve-member jury has been drawn and that seven or more of its members hold attitude X. If one dismisses that jury and draws a jury of six members from the same population, what is the probability that four or more members of the smaller jury will hold attitude X? The best estimate is about 77 per cent; thus, where a jury's decision may be traced to the attitudes with which its members view a problem, the verdict is a six-member jury drawn randomly from a population will differ from the verdict rendered by a twelve-member jury drawn from the same population about 23 per cent of the time. Adding these cases of expected divergency (23 per cent of the 20.3 per cent of cases in which judge-jury disagreement was attributable to additional differences, or 4.7 per cent of the total sample) to the previous minimum estimate of 9.4 per cent produces a final estimate of 14.1 per cent as the proportion of cases in which jury size has a reasonable probability of affecting jury verdicts. Lempert, supra n. 6, at 651-53 (footnote omitted)

(4) Detriment to the Defendant

The most serious problem, as noted above, is the greater possibility that truly innocent defendants will be found guilty as a result of the change in jury size. Once again, the post-Williams studies

studies find that reduction in jury size substantially increases the risk of erroneous conviction:

> [I]n the course of 1000 trials, 21.3 innocent defendants are likely to be convicted by a six-person jury, while only 20 innocent defendants are likely to be convicted by a twelve-person jury. That 1.3 difference represents a 6-1/2 percent increase over 20 defendants, or a six percent decrease from 21.3 defendants. It does sound socially undesirable to increase the number of innocent defendants convicted by 6-1/2 percent. It sounds even worse to note that the probability of convicting an innocent defendant goes up from 0.40 to 0.427 when a jurisdiction changes from a twelve-person jury to a six-person jury. That is almost a seven percent increase in the possibility of an innocent person being convicted (0.027/0.40). Conversely, someone concerned about not convicting the guilty might note that the probability of a guilty defendant not being convicted rises from 0.284 for a six-person jury to 0.297 for a twelve-person jury. That represents an increase of almost five percent (0.013/0,284). Nagel and Neef, supra n. 7, at 959-60.

Other studies come to the same conclusion based on slightly different approaches. Hans Zeisel has shown that the number of hung juries dramatically decreases when the jury size is reduced from twelve to six. There are hung juries on a national average in about 5% of the cases heard by twelve-

person juries. However, in Florida, when six-person juries are used, the number of hung juries was reduced to 2.4%. 11/

This change is especially crucial, and it demonstrates how severely the constitutional right of trial by jury has been impaired by Williams. Our criminal justice system has been predicated on the judgment that, in Blackstone's famous phrase, "it is better that ten guilty persons escape than that one innocent suffer." 12/ But the change in jury size significantly affects the results reached by juries, and leads to fewer hung juries, more convictions, and the inevitable conviction of significant numbers of innocent defendants.

C. The Sixth Amendment Right To Trial By Jury Guarantees Unanimity In Jury Verdicts.

It is hardly necessary for amici to attempt to persuade the Court that unanimity is an essential attribute of the historical

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11/ Zeisel, ...And Then There Were None: The Diminution of the Federal Jury, 38 U. of Chic.L.Rev. 710, 720 (1971). Another study has demonstrated the mathematical basis for this result. See The Effect of Jury Size on the Probability of Conviction, supra n. 6 at 547.

12/ 4 W. Blackstone Commentaries 358.

right of trial by jury, for a majority of the Court has consistently and resolutely upheld precisely that view. Indeed, in both Johnson and Apodaca, a majority of the court agreed that unanimity was "one of the essential attributes subsumed under the term" "jury trial." See 406 U.S. at 370, n. 6 (Powell, J., concurring); 406 U.S. at 381-83 (Douglas, Brennan, and Marshall, JJ., dissenting); 406 U.S. at 395 (Brennan and Marshall, JJ., dissenting); 406 U.S. at 397 (Stewart, Brennan, and Marshall, JJ., dissenting); 406 U.S. at 414 (Stewart, Brennan, and Marshall, JJ., dissenting). 13/ A majority of the Court has

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13/ The judgments in Apodaca were particularly anomalous, for different majorities of the Court in that case agreed that the Sixth Amendment requires a unanimous verdict in federal criminal jury trials, and that the right to jury trial guaranteed by the Sixth Amendment was to be enforced against the states according to the same standards protecting the federal right. However, Mr. Justice Powell, who did not agree that the Sixth Amendment standards applied to the states, joined the plurality and voted to affirm the judgments. Nevertheless, in some sense, as Mr. Justice Brennan observed, the opinions in Apodaca and Johnson were consistent with "a holding that only a unanimous verdict will afford the accused in a state criminal prosecution the jury trial guaranteed him by the Sixth Amendment. 406 U.S. at 395 (Brennan, J., dissenting.

never wavered from the view that the jury right protected by the Framers was a right to a unanimous jury. Id. That frequently repeated view is amply supported by the records of ratification. As is well known, the Constitution was finally ratified in the requisite number of states only after its proponents agreed that a Bill of Rights would be quickly added to it to protect the lives and liberties of all citizens against arbitrary power by the federal government. In many of the state ratifying conventions, proposed amendments were introduced showing the type of protection expected.

The most important debates on ratification, producing the Federalist Papers, took place in New York, the most populous state at the time and one whose adherence was geographically necessary to make the existing group of states into a single nation. One section of the New York proposed amendments focused specifically on the need for unanimous jury verdicts, and provided

> That (except in the Government of the Land and Naval Forces, and of the Militia when in actual Service, and in cases of Impeachment) a Presentment or Indictment by a Grand Jury ought to be observed as a necessary preliminary to the trial of all Crimes cognizable by the Judiciary of the United

> States and such Trial should be speedy, public, and by an impartial Jury of the County where the Crime was committed; and that no person can be found Guilty without the unanimous consent of such Jury. 14/

When the New York convention voted to ratify the Constitution on July 26, 1788, by a vote of 30 to 27, the agreement of the Federalist supporters to introduce quickly a group of amendments along the lines of the New York proposals was crucial in securing the necessary votes. In this light, it is simply unthinkable that the First Congress would propose an amendment on the right of trial by jury, dispensing with the unanimity requirement, without a word of protest by any member of the New York Congressional delegation. The only conclusion to be drawn is that, while the language of the Sixth Amendment was modified and simplified, there was no thought of changing the sturcture of the jury as the Founders had always known it - a body acting unanimously to determine a person's guilt or innocence.

14/ B. Schwartz, supra n. 4, at 911-12; Documentary History of the Constitution of the United States, Volume 2, pp. 190-202.

D. The Sixth Amendment Right To Trial By Jury Guarantees Unanimity In Jury Verdicts Because Unanimity Is Essential To The Historical Functions Of The Jury.

Almost uniformly, scholarly work on jury unanimity has found that if a minority position is asserted in a situation where its adherent's vote is not necessary to decide the question, then the majority will largely ignore it. Put another way, if they do not have to do so, a majority will give only the most cursory consideration to minority views. One study inquired whether juries not bound by the rules of unanimity would conscientiously and comprehensively discuss the views of minority members:

> [T]here were 36 juries which were assigned a nonunanimous rules. Of this number, 26 had a two-thirds majority on their first poll without achieving unanimity. Among these 26 juries, 9 juries (35%) decided immediately upon the majority position. Several more (4) of these juries deliberated for only a very short time (5 minutes or less) after the first poll and then outvoted a minority. Only 6 of these juries deliberated for more than 10 minutes, and all of these out-voted an unconvinced minority. These data suggest that the increased speed of deliberation found for the juries assigned a non-unanimous rule may have resulted

> from cursory consideration of dissenting views. We would naturally hope and expect that real jurors would be more conscientious than our student mock jurors, but these data raise interesting questions about the Court's sanguine view of jury deliberation. Davis, Kerr, et al., supra n. 7, at 12.

The decisions permitting non-unanimous juries in Johnson and Apodaca relied, as had the decision in Williams, on social science data which seemingly showed that unanimity was not indispensible to the proper functioning of the jury system. But just as recent studies cast sharp doubt on the premises underlying Williams, they cast doubt on Johnson and Apodaca as well. Indeed, the requirement of unanimity is more crucial in preserving the traditional common law conception of jury trial than the requirement of twelve jurors, for elimination of the unanimity requirement significantly reduces the likelihood of meaningful jury debate:

> a majority verdict requirement is far more effective in nullifying the potency of minority views than is the outright reduction of jury size equivalent to the majority that is allowed to agree on a verdict. 15/

15/ Zeisel, supra n. 11, at 722.

Professor Zeisel has concluded that while reducing the number of jurors was a "jury enfeebling measure," abandoning the requirement of jury unanimity is "reduction with a vengeance." 16/

Various studies have been made of the difference in results between six-person juries acting unanimously and twelve-person juries acting by ten to two votes. In a significant number of instances, the larger jury acting by majority vote was more likely to convict than the smaller, but still unanimous jury:

> Note that the probability of conviction for the unanimous 12 out of 12 verdict stays relatively low throughout a wide range of apparent guilt (first reaching 50% at about 95% apparent guilt) approximating the ideal situation of no conviction as long as there is a reasonable doubt of the individual's guilt. Of course, society therefore runs a risk that many individuals who are indeed guilty (in the actual, not legal, sense) are likely to be convicted with this system. The 10 out of 12 criterion leads to a much different picture with the curve rising very sharply to a 50% probability at level of 78% apparent guilt. Compared to the 12 out of 12 criterion, a defendant under a 10 out of 12 criterion is 8 times

16/ Zeisel, supra n. 11, at 722.

> more likely to be convicted at 80% apparent guilt and 3 times more likely at 90% apparant guilt. The conviction patterns for an 11 out of 12 and a unanimous 6 out of 6 criterion are similar and are intermediate between the 12 out of 12 and 10 out of 12 results. Friedman, Trial by Jury: Criteria for Convictions Jury Size and Type I and Type II Errors, 26-2 Am. Stat. 21, 22 (April 1972).

Nagel and Neef, supra n. 7 at 976-977, came to the same conclusion using a different approach. Based on their premises, "an innocent person has a 92% chance of being convicted under a 10/12 rule, whereas Table 2 indicates that such a person has only a 63 percent chance of being convicted under a 6/6 rule." They continue:

> [A] 10/12 rule will always result in a higher probability of the innocent being convicted than a 6/6 rule.... Intuitively, one might believe that the probability of convicting an innocent person under a 6/6 rule is greater than under a 10/12 rule, because only six persons have to be convinced of guilt under the 6/6 rule, but ten have to be convinced under the 10/12 rule. That kind of reasonable thinking, however, does not adequately consider how much easier it is not to have to convince everybody on a jury, even though the total number of decision-makers is somewhat larger. Id.

Zeisel agrees that a jury of twelve that acts through a ten to two majority vote is far less likely to have a minority group presence that can effect the outcome:

> Looking first at the 100 twelve-member juries, we expect to find 38 juries with one minority representative, 23 with two, and 11 with three or more. If these twelve-members juries must be unanimous to reach a verdict, the majority will have to reckon with at least one minority member in 38 + as + 11 = 72 out of the 100 cases. If these juries are permitted to reach a verdict by agreement of ten jurors, than the majority will be able simply to disregard the minority position in 38 + 23 = 61 of the 72 cases. Only in the 11 cases in which we must expect three or more minority jurors will they be able to influence the verdict.
> Zeisel, supra n. 11, at 723.

These studies, based upon statistical analysis, probability theory, and other social science analysis, indicate that the various "jury enfeebling" measures do, indeed, make a difference. An appreciably larger number of persons will be convicted under a majority rule procedure. Necessarily a larger number of innocent persons will be caught up in this greater conviction rate. Whatever one can say about the

need for saving money in empaneling smaller juries or the greater efficiency in a majority vote system, such a significant change in our jury structure surely needs more justification from those who would alter a procedure relied on in Anglo-American law for over 500 years for determining guilt and innocence.

II. IN THE ALTERNATIVE, A STATE MAY EITHER REDUCE THE SIZE OF A JURY OR PROVIDE FOR CONVICTION BY A SUBSTANTIAL MAJORITY, BUT IT MAY NOT DO BOTH.

We have argued above that both jury enfeebling devices employed by the state of Louisiana are unconstitutional. If this Court decides that either one of them is invalid, then the conviction must be reversed.

But even if their Court does not overrule Williams or Johnson and Apodaca, it does not have to accept a procedure that aggravates all the problems connected with each of the modifications of the jury. The difference between unanimous conviction by a twelve-member jury and a conviction by five members of a six-member jury are too obvious to ignore. When this Court accepted the six-member jury in Williams, it emphasized that a unanimous vote was required. 399 U.S. at 100. It upheld the ten of twelve and nine of twelve convictions in Johnson and Apodaca only by the slimmest of margins, and without the benefit of many of the later studies relied on in Ballew. To continue the move down "the slippery slope" would seriously alter a system devised in far more uncivilized times to insure fairness in the state's application of the criminal law.

Conviction by a non-unanimous six-member jury entails all of the defects of both of the earlier modifications in aggravated form. In terms of obtaining a fair cross-section of the community, the Louisiana system necessarily would have fewer and fewer minority group members or members with a minority point of view, and those members are more easily struck by peremptory challenges before empanellment. In terms of group deliberation, the other members of the smaller jury would simply not have to consider that point of view if they did not need the last vote for conviction. Saks has found an "enormous" difference between larger and smaller non-unanimous juries:

> Each of the studies...found that it is the absolute rather than the relative size of the opposition that determined factional influence, and that having an ally (10-2) as compared to having no ally (5-1) makes an enormous difference. This is a classic and well known finding in social psychology research on conformity. The presence of an ally is one of the most powerful known facilitators of minority resistence to conformity pressure.
> Saks, supra p. 19, at 19.

These findings lead inevitably to the conclusion that five to one verdicts will

impair the accuracy of verdicts to the appreciable detriment of defendants. The unanimous vote of a twelve-member jury is the standard required by the Sixth Amendment for all federal criminal juries: the appreciable change in jury functioning and results entailed by a five to one verdict so far depart from that standard as to violate any norms of due process or jury trial rights.

Finally, it should be noted that a five to one verdict will allow five persons to convict an individual, a conclusion at odds with this Court's decision in Ballew condemning a unanimous vote by a five-member jury; yet studies cited above plainly indicate that the unanimous vote is more protective of a defendant's rights. The conviction here is plainly at odds with this Court's reasoning and analysis in Ballew.

CONCLUSION

The tinkering with the jury system that a few states have undertaken is not merely "an experiment," and the states are not merely acting as laboratories for differing forms of criminal justice reform. The experiments involved here are not at the fringes of the system, such as differing rules on the presence of attorneys in

grand jury rooms or on the scope of preliminary hearings. The alterations of the traditional rules of jury size and unanimity strike at the heart of the jury function which for centuries has kept the entire criminal justice system operating as a bulwark against tyranny and governmental overreaching.

For the reasons noted above, the judgment below should be reversed.

Respectfully submitted,

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December 14, 1978

* Counsel wish to acknowledge the assistance of Dolores Frederich, a second-year law student at Hofstra University School of Law, in the research and prepartion of this brief.